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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

Charles R. Dorsey,
Petitioner,

v.

State of Texas,
Respondent.

No. _____
April 29, 2008

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1.) Whether admission of decedent/wife's out-of-court statement to a friend, regarding fears her husband/Dorsey would kill her, as read into evidence by a police officer, violated the Confrontation Clause as articulated in *Crawford v. Washington*, 541 U.S. 36 (2004)?

2.) Whether the out-of-court video tape of Dorsey's 2-½ year old child prepared as an evidentiary interview/experiment and narrated by a law enforcement officer, violated the Confrontation Clause pronounced in *Crawford, Id.*?

3.) Whether the States' narrative proffer of a Hollywood movie plot to prove and bolster their theory of the case, though never establishing Dorsey had seen this movie, violated mandatory Texas Rules of Evidence 404(b) for relevance and Rule 403 as unduly prejudicial?

TABLE OF CONTENTS

Questions Presented..... i

Table of Contents..... iii

Table of Authorities.....vi

Opinions and Rulings 1

Constitutional and Statutory Provisions... 2

Jurisdictional Statement..... 2

Statement of the Case..... 3

Reasons for Granting the Petition.....iii, 11

A. The admission of decedent friend's out-of-court statements to police officer regarding fear of her husband/Dorsey, their turbulent marriage and thoughts that he would kill her, violated clearly established law regarding Dorsey's Confrontation Clause rights as articulated in *Crawford* and the law of this case;

B. The out-of-court testimonial video taped interview/experiment of the Dorsey's child Conner, with narration by a government officer who claimed it was 'self explanatory,' violated Appellant's Confrontation rights;

C. In this 'entirely circumstantial[1]' case, the government's proffer of a Hollywood Movie plot to establish and bolster their theory of the case, without proving Dorsey had seen this movie, was irrelevant, prejudicial and was not harmless error;

Conclusion..... 13

Appendix..... 14

Appendix A .....24 S.W.3d 921 (Tex. App. – Beaumont (2000)..... 14

Appendix B .....117 S.W.3d 332 (Tex. App. – Beaumont (2003)..... 44

[1] *Dorsey, Id.* 24 S.W.3d at 930

Appendix C ..... Petition for Discretionary Review 77

Appendix D ..... PDR denied by Tex. CCA..... 98

Appendix E ..... Constitutional Provisions..... 99

Appendix F..... Tex Rule Evidence, Rule 107... 100

Appendix G..... Tex Rule Evidence, Rule 403... 101

Appendix H.....Tex Rule Evidence, Rule 404(b).102

TABLE OF AUTHORITIES

Cases:

Crawford v. Washington, 541 U.S. 36 (2004).. i, 3, 8

Danforth v. Minnesota, 128 S.Ct. 1029 (2008)... 4

Dorsey v. State, 24 S.W.3d 921 (Tex. App. – Beaumont, 2000)..... iv, 1, 5, 8

Dorsey v. State, 117 S.W.3d 332 (Tex. App. – Beaumont, 2003)..... 1, 5, 11

Kotteakos v. United States, 328 U.S. 750, 776 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946).. 5

Lowery v. Collins, 996 F.2d 770 (5th Cir.1993)....9

Offor v. Scott, 72 F.3d 30, (5th Cir.1995) 9

Ohio v. Roberts, 448 U.S. 56 (1980)..... 4

Sauceda v. State, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004)..... 8

U.S. Constitutional Amendments:

Sixth Amendment..... 2

Fourteenth Amendment..... 2

U.S. Supreme Court Rules:

U.S. Supreme Court Rule 10(b)..... 3

Statutes:

Texas Rules of Evidence, Rule 107..... 6, 7, 12

Texas Rules of Evidence, Rule 403..... 8, 12

Texas Rules of Evidence, Rule 404(b)..... 8, 10, 12

Petitioner Charles Ray Dorsey respectfully petitions for a writ of certiorari to review the judgment of the Texas Criminal Court of Appeals in this case.

OPINIONS AND RULINGS BELOW

The opinion and order reversing and remanding Appellant's case for retrial finding inadmissible hearsay violated Dorsey's substantial rights (Appendix A), is reported at 24 S.W.3d 921 (Tex. App. – Beaumont, 2000).

On remand, the opinion and order affirming the application of the Rule of Optional Completeness to readmit the previously inadmissible hearsay; the child's video tape and movie plot in Dorsey's case (Appendix B) are reported at 117 S.W.3d 332 (Tex. App. – Beaumont, 2003).

The Texas Court of Criminal Appeals denied Appellant's PDR (Appendix C) and the opinion was unpublished as illustrated in Appendix D.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

2. Section 1 of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

JURISDICTION

February 6, 2008, the Texas Court of Criminal Appeals, a State court of last resort,

refused Appellant's Petition for Discretionary Review. Appellant invokes jurisdiction pursuant to Supreme Court Rule 10(b): a State Court of last resort has decided an important federal question in a way that conflicts with the decision of ... a United States Court of Appeals, to wit, this Honorable Court.

STATEMENT OF THE CASE

This Honorable Court adopted a new test, under which such statements may not be introduced at trial unless the defendant had the opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 53-54. That decision specifically held:

1. "out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior

opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980);

2. admission of wife's out-of-court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim violated the Confrontation Clause; reversed and remanded.

The recent decision by this Court contemplating *Crawford* in *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008), found that, '[n]ew constitutional rules announced by this Court...must be applied in ... all cases pending on direct review..." *Danforth, Id.* 128 S.Ct. at 1032. Therefore, *Crawford* must be applied to Dorsey's case now on direct review.

The victim was Dorsey's wife. Dorsey claimed their 2-½ year old son Connor shot her. GSR tests

were negative on both Dorsey and son Conner; there were no witnesses or direct evidence so this case was 'entirely circumstantial.' *Id.* Dorsey was convicted and sentenced to 40 years incarceration by a State District Court in Texas.

I.

At issue in Dorsey, 117 S.W.3d, *Id.*, his third (3rd) trial, the government again, admitted the same out-of-court hearsay found to be inadmissible in *Dorsey*, 24 S.W.3d, *Id.* There, the appellate court found those hearsay statements were inadmissible and affected Dorsey's substantial rights citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946).

The trial court's justification for this admission in the instant case came from cross exam of a police officer, where Dorsey requested the officer 'examine his report to refresh his memory only and not

reading from the report, tell the jury what the trigger pound pull reflected.' That was the limit of the question line and subject matter Dorsey requested that the officer testify to if his memory was refreshed by his report. On redirect, over Dorsey's objections, this government witness read into evidence the decedent's friends out-of-court statements of fears and worries that her husband would kill her which were also contained in that report but were not referenced or alluded to in Dorsey's question line. Dorsey objected that this was hearsay, violated his confrontation rights, violated the law of the case and was not within the question subject matter elicited by Dorsey. The government claimed this out-of-court statement was allowed by the rule of optional completeness under Texas Rules of Evidence, Rule 107. Dorsey objected again that these out-of-court statements, though

contained in the report, were not 'opened up' in the explicit singular subject matter requested. The officer had been directed to refresh his memory from the report and not to read from it; then if refreshed, to discuss only the gun trigger pull ratings. These out-of-court decedent statements had no relevance to trigger pound pull ratings and left no area unclear necessitating clarification for a jury. The trial court overruled Dorsey's objections, the Texas Court of Appeals – Beaumont, affirmed and Dorsey's PDR was denied by the Criminal Court of Appeals.

The Rule of Optional Completeness is properly used to 'fully and fairly explain a matter 'opened up' by the adverse party. The purpose of the rule is to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing. 'The plain language of Rule 107 indicates that in order to be admitted ...

[it] must be "on the same subject" and must be "necessary to make it fully understood." *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004).

These out-of-court statements about 'fears her husband would kill her' did not complete, explain or clarify any aspect of the 'trigger pull' subject matter opened-up by Dorsey. This rule was misapplied, and the admission of this testimonial hearsay violated Dorsey's Confrontation Rights under *Crawford, Id.*, and the law of the case in *Dorsey*, 24 S.W.3d, *Id.* (Appendix A).

II.

The government then admitted into evidence an out-of-court video tape of Dorseys' 2½ year old child Conner, attempting to open the holster and pull the trigger of the gun. No audio was played to the jury but an officer testified as to the acts, observations and conclusions drawn from this powerful

testimonial tool they claimed was 'self explanatory.' In the record, Dorsey objected to the admission of the tape on the basis of a denial of Confrontation Rights but was overruled by the trial court and the appellate court affirmed. Between trials, this video evidence was constantly recharacterized by the government as 'interview/experiment.' Further, the video was conducted without a defense representative present or an order from the court.

The Fifth Circuit has held that the admission of a videotaped interview of a child *accuser* violated a defendant's confrontation rights, notwithstanding the fact that the defendant might call the child as a witness for the purpose of cross-examination. *Offor v. Scott*, 72 F.3d 30, 33 (5th Cir.1995) (citing *Lowery v. Collins*, 996 F.2d 770 (5th Cir.1993)). Though Conner was not an accuser, he was ostensibly used as such, and his age of 2½ did not realistically apply

to calling Conner as a witness for cross exam of this testimonial evidence. 'A defendant may not be forced to be the one to call the child witness.' *See id.* 'Nor is it an answer that the defendant might have called the child in order to cross-examine.' *Id.* at 771. The manner in which this out-of-court video with officer narrative was presented to the jury, allowed no vehicle to confront the witness against Dorsey.

III.

Without proving Dorsey had seen the movie in this 'entirely circumstantial' case, the trial court allowed the government to read into evidence a Hollywood movie plot which comported with, and bolstered the government's theory of the case violating *Crawford Id.* This admission was over Dorsey's vehement objections for violations of Texas Rules of Evidence, Rule 404(b) for relevance

and the admission was highly prejudicial under Rule 403. The Texas trial and appellate court's erred in overruling Dorsey's objections.

IV.

Dorsey filed a direct appeal to the Ninth Supreme Court of Appeals of Texas – Beaumont, in *Dorsey*, 117 S.W.3d, *Id.*, which affirmed the decision of the trial court. The Texas Court of Criminal Appeals denied Dorsey's Petition for Discretionary Review on February 6, 2008.

REASONS FOR GRANTING THE PETITION

I. The admission of the officer's out-of-court statements of the decedent's friend regarding fears about the Decedent's husband and thoughts that he would kill her clearly violated Dorsey's Confrontation Rights under *Crawford, Id.*,

the law of the case and the rule of optional completeness, Rule 107;

II. The out-of-court testimonial narrated video of Conner attempting to open decedent's holster and pull the trigger provided no means to confront a witness, thus violating Dorsey's Confrontation Rights under *Crawford, Id.* as claimed in the record;

III. In this 'entirely circumstantial case,' the government's proffer of a Hollywood Movie plot to establish and bolster their theory of the case, without proving Dorsey had seen the movie, made it irrelevant under Texas Rules of Evidence, Rule 404(b) and highly prejudicial under Texas Rule of Evidence, Rule 403. Its admission (into evidence) was not

harmless error and it had a substantial injurious effect and influence in determining the jury's verdict.

CONCLUSION

Because the foregoing Constitutional protections and mandatory statutes were clearly violated, a petition for a writ of certiorari should be granted.

APPENDIX

Appendix A

24 S.W.3d 921
Court of Appeals of Texas,
Beaumont.
Charles Ray DORSEY, Appellant,
v.
The STATE of Texas, Appellee.
No. 09-98-501 CR.
Submitted Dec. 9, 1999.
Decided Sept. 6, 2000.

Defendant was convicted in the District Court, Montgomery County, A.D. Azios, J., of murder and he appealed. The Beaumont Court of Appeals, Stover, J., held that: (1) legally sufficient evidence supported conviction; (2) hearsay testimony of victim's boss that victim told her she was thinking of leaving defendant and wanted the name of a divorce attorney, and hearsay testimony describing victim's fear of defendant were admissible under state of mind exception to rule against hearsay; (3) hearsay testimony recounting victim's statement that if anything strange happened to her, like a car crash, it meant that defendant had killed her was inadmissible under state of mind exception to rule against hearsay; (4) hearsay statements of victim that defendant had once held her down on the bed with a knife to her throat, that he held a gun to her head and throat and had put a gun into her mouth, and that he followed her everyday to work to make certain she was there were inadmissible under state of mind exception to rule against hearsay; and (5) error in admitting

victim's hearsay statements regarding victim's memories of specific instances of defendant abusing her, and regarding her belief that defendant would be responsible for her death required reversal of murder conviction.
Reversed and remanded.
Walker, J., filed concurring opinion.
West Headnotes

[1] KeyCite Notes

⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(M) Presumptions
⇦110k1144 Facts or Proceedings Not Shown by Record
⇦110k1144.13 Sufficiency of Evidence
⇦110k1144.13(2) Construction of Evidence
⇦110k1144.13(2.1) k. In General. Most Cited Cases

⇦110 Criminal Law KeyCite Notes
⇦110XXIV Review
⇦110XXIV(P) Verdicts
⇦110k1159 Conclusiveness of Verdict
⇦110k1159.2 Weight of Evidence in General
⇦110k1159.2(7) k. Reasonable Doubt. Most Cited Cases
In evaluating legal sufficiency, Court of Appeals must view the evidence, both direct and circumstantial, in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt.

[2] KeyCite Notes

⇐110 Criminal Law
⇐110XXIV Review
⇐110XXIV(L) Scope of Review in General
⇐110k1134 Scope and Extent in General
⇐110k1134(2) k. Matters or Evidence Considered. Most Cited Cases
All evidence admitted at trial, both direct and circumstantial, including improperly admitted evidence, is considered in a legal sufficiency review.

[3] KeyCite Notes
⇐110 Criminal Law
⇐110XXIV Review
⇐110XXIV(M) Presumptions
⇐110k1144 Facts or Proceedings Not Shown by Record
⇐110k1144.13 Sufficiency of Evidence
⇐110k1144.13(2) Construction of Evidence
⇐110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

⇐110 Criminal Law KeyCite Notes
⇐110XXIV Review
⇐110XXIV(P) Verdicts
⇐110k1159 Conclusiveness of Verdict
⇐110k1159.2 Weight of Evidence in General
⇐110k1159.2(2) k. Verdict Unsupported by Evidence or Contrary to Evidence. Most Cited Cases
In determining whether the evidence is factually sufficient to support the conviction, Court of Appeals must view all of the evidence, both direct and circumstantial, without the prism of "in the light most favorable to the prosecution," and set aside the

verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

[4] KeyCite Notes

⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(P) Verdicts
⇦110k1159 Conclusiveness of Verdict
⇦110k1159.2 Weight of Evidence in General
⇦110k1159.2(1) k. In General. Most Cited Cases

⇦110 Criminal Law KeyCite Notes

⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(P) Verdicts
⇦110k1159 Conclusiveness of Verdict
⇦110k1159.4 Credibility of Witnesses
⇦110k1159.4(2) k. Province of Jury or Trial Court. Most Cited Cases

In its sufficiency review, Court of Appeals is governed by the fact that the jury is the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony. Vernon's Ann.Texas C.C.P. art. 38.04.

[5] KeyCite Notes

⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(V) Weight and Sufficiency
⇦110k553 k. Credibility of Witnesses in General. Most Cited Cases

The jury may believe or disbelieve all or any part of a witness's testimony, even though the witness's testimony has been contradicted.

[6] KeyCite Notes

⇦110 Criminal Law

⇦110XX Trial

⇦110XX(F) Province of Court and Jury in General

⇦110k733 Questions of Law or of Fact

⇦110k747 k. Conflicting Evidence. Most Cited Cases

Reconciliation of conflicts in the evidence is within the exclusive providence of the jury.

[7] KeyCite Notes

⇦110 Criminal Law

⇦110XVII Evidence

⇦110XVII(D) Facts in Issue and Relevance

⇦110k339.5 Identity of Accused

⇦110k339.6 k. In General. Most Cited Cases

Where identity is an issue in the case, the identity of the perpetrator may be proved by direct or circumstantial evidence.

[8] KeyCite Notes

⇦203 Homicide

⇦203IX Evidence

⇦203IX(G) Weight and Sufficiency

⇦203k1176 Commission of or Participation in Act by Accused; Identity

⇦203k1184 k. Miscellaneous Particular Circumstances. Most Cited Cases

(Formerly 203k234(8))

Legally sufficient evidence existed to support murder conviction; defendant was present at scene of murder, evidence from various witnesses revealed history of abusive relationship between defendant

and victim, who was defendant's wife, although defendant testified that his two-and-a-half year old son killed victim, videotape revealed that child could not get gun from holster and could not shoot it in an uncocked position, and autopsy report revealed presence of bruising on victim's neck, around her eye, and left temple, as well as presence of petechiae in whites of victim's eye, which indicated choking, strangulation, or ligature.

[9] KeyCite Notes

203 Homicide

203IX Evidence

203IX(G) Weight and Sufficiency

203k1176 Commission of or Participation in Act by Accused; Identity

203k1184.5 k. Presence at Scene of Crime. Most Cited Cases

(Formerly 203k234(1))

By itself, mere presence at the scene of the crime is not sufficient to support a conviction for murder; it is, however, a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant or the perpetrator.

[10] KeyCite Notes

110 Criminal Law

110XVII Evidence

110XVII(N) Hearsay

110k419 Hearsay in General

110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Testimony of victim's boss that victim told her she was thinking of leaving defendant and wanted the

name of a divorce attorney was admissible in murder prosecution under state of mind exception to rule against hearsay, as it showed her future intent to leave defendant. Rules of Evid., Rule 803(3).

[11] KeyCite Notes

⇦110 Criminal Law

⇦110XVII Evidence

⇦110XVII(N) Hearsay

⇦110k419 Hearsay in General

⇦110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Hearsay testimony describing victim's fear of defendant, who was her husband, was admissible in murder prosecution under state of mind exception to rule against hearsay to show victim's emotional state or mental feeling at time she made statement. Rules of Evid., Rule 803(3).

[12] KeyCite Notes

⇦110 Criminal Law

⇦110XX Trial

⇦110XX(L) Waiver and Correction of Irregularities and Errors

⇦110k899 k. Rulings as to Admissibility of Evidence. Most Cited Cases

Defendant does not waive the harmful effect of improperly admitted evidence when he seeks to meet, destroy, or explain it.

[13] KeyCite Notes

⇦110 Criminal Law

⇦110XXIV Review

⇦110XXIV(N) Discretion of Lower Court

⇦110k1153 Reception and Admissibility of

Evidence; Witnesses
⇦110k1153(1) k. In General. Most Cited Cases
Trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard on appeal.

[14] KeyCite Notes
⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(N) Discretion of Lower Court
⇦110k1147 k. In General. Most Cited Cases
A reviewing court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement.

[15] KeyCite Notes
⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(M) Declarations
⇦110k416 Declarations by Third Persons
⇦110k417 In General
⇦110k417(1) k. In General. Most Cited Cases
Statements of intent by the declarant to prove future conduct are generally admissible when the future conduct is relevant to some aspect of the case.

[16] KeyCite Notes
⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(N) Hearsay
⇦110k419 Hearsay in General
⇦110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases
Hearsay testimony recounting victim's statement that if anything strange happened to her, like a car

crash, it meant that defendant, who was victim's husband, had killed her, was inadmissible in murder prosecution under state of mind exception to rule against hearsay, as statement represented a belief held by victim. Rules of Evid., Rule 803(3).

[17] KeyCite Notes

⇦110 Criminal Law

⇦110XVII Evidence

⇦110XVII(N) Hearsay

⇦110k419 Hearsay in General

⇦110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Hearsay statements of victim that defendant, who was victim's husband, had once held her down on the bed with a knife to her throat, that he held a gun to her head and throat and had put a gun into her mouth, and that he followed her everyday to work to make certain she was there were inadmissible in murder prosecution under state of mind exception to rule against hearsay, as statements were not reflective of victim's state of mind or emotional state, but were victim's memories of specific events.

[18] KeyCite Notes

⇦110 Criminal Law

⇦110XXIV Review

⇦110XXIV(Q) Harmless and Reversible Error

⇦110k1169 Admission of Evidence

⇦110k1169.1 In General

⇦110k1169.1(9) k. Hearsay. Most Cited Cases

Error in admitting victim's hearsay statements regarding victim's memories of specific instances of defendant, who was her husband, abusing her, and regarding her belief that defendant would be

responsible for her death required reversal of murder conviction; graphic evidence of specific abusive incidents was extremely prejudicial and damaging in view of fact that cause of victim's death was a gunshot wound to the head, victim's memories of specific abusive incidents, along with her belief that defendant would be responsible for her death would have had telling effect upon jury, and while evidence of defendant's guilt might have been compelling, it was not overwhelming. Rules App.Proc., Rule 44.2(b).

[19] KeyCite Notes

⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(Q) Harmless and Reversible Error
⇦110k1169 Admission of Evidence
⇦110k1169.2 Curing Error by Facts Established Otherwise
⇦110k1169.2(1) k. In General. Most Cited Cases

The improper admission of evidence does not constitute reversible error if the same facts are proved by other properly admitted evidence.

[20] KeyCite Notes

⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(Q) Harmless and Reversible Error
⇦110k1165 Prejudice to Defendant in General
⇦110k1165(1) k. In General. Most Cited Cases

A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. Rules App.Proc., Rule 44.2(b).

[21] KeyCite Notes

⇦110 Criminal Law

⇦110XXIV Review

⇦110XXIV(L) Scope of Review in General

⇦110k1134 Scope and Extent in General

⇦110k1134(2) k. Matters or Evidence Considered. Most Cited Cases

Court of Appeals reviews the record as a whole to determine whether the error had a substantial and injurious effect or influence on the jury's verdict. Rules App.Proc., Rule 44.2(b).

*923 Jimmy Parks, San Antonio, for appellant.

Michael A. McDougal, Dist. Atty., Gail Kikawa McConnell, Asst. Dist. Atty., Conroe, for State.

Before WALKER, C.J., BURGESS and STOVER, JJ.

OPINION

EARL L. STOVER, Justice.

A jury convicted appellant Charles Ray Dorsey of murder FN1 of his wife, Pamela Dorsey, and sentenced him to life imprisonment in the Texas Department of Criminal Justice-Institutional Division. Dorsey*924 appeals his conviction with twenty-three points of error.FN2

FN1. Pursuant to Tex. Pen.Code Ann. § 19.02(b)(1) (Vernon 1994), a person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

FN2. Three different judges presided at different stages of the case. Prior to declaring a mistrial in the case, the Honorable Ross Sears presided over appellant's motion to suppress and motion to change venue; the Honorable Charles Hearne later presided over appellant's reurging of his motion to change venue and the jury selection process; and the Honorable A.D. Azios presided at trial.

In point of error twenty-one, Dorsey contends the evidence was legally and factually insufficient to support his conviction. Specifically, he argues that because there was no eyewitness to the murder, no evidence of blood spatter on his person or clothes, and no "hair, fiber, or fingerprint evidence that in any way indicated he was the perpetrator," the evidence was insufficient to show he murdered Pamela Dorsey.

[1] [2] [3] [4] [5] [6] [7] Set forth below is the standard by which an appellate court reviews legal and factual sufficiency points; it is the same for both direct and circumstantial evidence. See Geesa v. State, 820 S.W.2d 154, 158 (Tex.Crim.App.1991).

In evaluating legal sufficiency, we must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

....

[A]ll evidence admitted at trial-including improperly admitted evidence-is considered in a legal sufficiency

review. Dewberry v. State, 4 S.W.3d 735, 740-41 (Tex.Crim.App.1999), cert. denied, 529 U.S. 1131, 120 S.Ct. 2008, 146 L.Ed.2d 958 (2000).

....

In determining whether the evidence is factually sufficient to support the conviction, we must view all of the evidence, without the prism of "in the light most favorable to the prosecution," and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Clewis v. State, 922 S.W.2d 126, 129 (Tex.Crim.App.1996).

Wilson v. State, 7 S.W.3d 136, 141 (Tex.Crim.App.1999). In our sufficiency review, we are governed by the fact that the jury is the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony. Tex.Code Crim. Proc. Ann. Art. 38.04 (Vernon 1979). The jury may believe or disbelieve all or any part of a witness's testimony, even though the witness's testimony has been contradicted. Sharp v. State, 707 S.W.2d 611, 614 (Tex.Crim.App.1986). Reconciliation of conflicts in the evidence is within the exclusive providence of the jury. Jones v. State, 944 S.W.2d 642, 647 (Tex.Crim.App.1996). Where, as here, identity is an issue in the case, the identity of the perpetrator may be proved by direct or circumstantial evidence. See Earls v. State, 707 S.W.2d 82, 85 (Tex.Crim.App.1986).

BACKGROUND

Early in the morning on May 14, 1996, Charles

Dorsey called 911 and reported that his wife Pamela Dorsey had been shot. He told the operator that "it's my little boy. He got in her purse and got her gun." Delane Potter, a patrol security officer for the subdivision in which the Dorseys lived, responded to the emergency call. In the bedroom of the house, the security officer found Pamela Dorsey "lying [face down] in the bed, covered up to about to the neck." Potter indicated that Dorsey was very upset, and two and one half year old Connor appeared confused and disoriented. Potter did not notice any blood on either Dorsey, the child, or the carpet. Neither did he see much blood on the bed sheets. He did observe, however, "what seemed like about two drops of blood that came out of her nose and onto her wrist." Potter testified that in the six and one half years he had worked at the *925 subdivision, he had never been to the Dorsey home on a disturbance call.

James Reed, the EMT on the scene, described the emergency procedures performed on Pamela that night. He also testified he observed "some blood" coming from her nose and a small amount of blood on the pillow and on both sides of her head. Reed was not aware of any blood in other parts of the room or on the sheet that covered her. According to Reed, none of the procedures performed on Pamela Dorsey by emergency personnel that night would have caused bruising or injury to her head, skull, or facial area.

Also called to the home in the early morning hours of May 14, 1996, was Peggy Frankhauser, head of the automated fingerprint system for the Montgomery

County Sheriff's Department. She testified a revolver and a holster were found on the floor by the night stand and the bed. At the base of the triple dresser in the bedroom was Pamela Dorsey's purse with the contents dumped out beside it.

Dr. Vladimir Parangao, assistant medical examiner of Harris County, testified regarding the autopsy report. He indicated the cause of Pamela's death was a gunshot wound to the back of the head.

An examination of the body revealed a small abrasion around the right eye, along with some discoloration around the eye that made it appear "like a black eye." The abrasion to the right eye area could not have been caused by the gunshot. The hemorrhage in the muscle around the left temple was the result of a blunt trauma and not of a gunshot wound. Dr. Parangao testified "[s]omething hit this part of the head, whether it was hit by something blunt, or the head hit something blunt." The examination also revealed a "light blue-purple contusion on the left side of the neck that extend[ed] up to the left shoulder." In Dr. Parangao's opinion, there was some type of trauma to the neck that could have been consistent with choking. In addition, there were petechiae, thin hair-sized hemorrhages in the whites of Pamela's eyes, that were caused by asphyxia from choking, strangulation, ligature, or smothering. Parangao testified the injuries associated with choking were distinguishable from those caused by the tracheotomy performed on Pamela Dorsey during the emergency medical treatment on May 14. Also present were "abrasions of the upper chest" that were consistent with the

administration of CPR by the emergency personnel.

On cross-examination, Dr. Parangao acknowledged he did not know what procedures, other than CPR, the medical personnel performed on Pamela Dorsey in an attempt to save her life. He acknowledged the possibility that emergency personnel could have handled her body in such a way as to cause some of the injuries noted in the autopsy. On further examination by the State, however, Dr. Parangao testified the presence of the petechiae is not consistent with a body being mishandled, because petechiae only occur before the person's death-while alive or in the process of dying.

Ivan Wilson, who works for the Department of Public Safety Crime Lab in Austin, performed a gunshot residue analysis on the clothing of Dorsey and Connor and on the hands of Dorsey, Pamela, and Connor. He detected no residue on Dorsey's or Connor's clothing.

In explaining the gunshot residue test performed on a person's hands, Wilson testified that the analyst looks for the presence of three elements-antimony, barium, and lead. If all three elements are present, the test is positive; if all three elements are not present, the test is negative. However, in the case of most .22 caliber ammunition, he indicated no antimony is present, only barium and lead. Wilson did not know what kind of ammunition was used in the murder weapon, a .22 revolver.

Wilson classified each of the three gunshot residue tests on the hands as negative. However, he did

indicate the test on *926 Connor's hands detected the presence of two of the elements, barium and lead, but not antimony. According to Wilson, Connor's test was classified negative, because all three elements were not present.

In explaining the possible meanings of a negative test, Wilson testified that several possibilities exist:

(a) The person did not fire the weapon himself or did not handle it after it was fired.

(b) A person wearing gloves fired the weapon, or a person without gloves fired the weapon and then removed the residue by wiping or washing his hands.

(c) The weapon was not a type that deposits residue.

(d) The .22 caliber ammunition used in the gun was the type that did not contain antimony.

(e) The same weapon may have deposited residue in one shot and not in another.

Even with a positive residue test, Wilson indicated it is still possible that the person did not fire the gun, but instead handled it after it was fired by someone else.

David Tanner, firearms examiner with the Montgomery County Sheriff's Department, testified regarding trigger pull pressure and gun safety. In double action mode (hammer forward), the gun had a trigger pull pressure of eleven pounds, while in

single action mode (hammer cocked), the pressure was four pounds. Commenting on gun safety, Tanner testified the safest way to carry a revolver is in the double action mode. Similarly, Detective Tidwell, a firearms examiner for the Montgomery County Sheriff's Department, stated he had never seen or known anyone who carried a revolver cocked.

Also admitted into evidence was a video tape of Connor Dorsey that the State made some fourteen days after the murder. One purpose of the tape was to conduct an experiment to determine whether the child was capable of pulling the trigger on the gun. The tape shows that Connor had the physical capability of pulling the trigger of the gun when the hammer was cocked; however, when the gun's hammer was not cocked, he was unable to pull it. The videotape also reveals that Connor had difficulty holding up the gun and could not open the holster when it was snapped shut.

Various witnesses testified concerning conversations with Pamela in which she told them she feared for her safety. Her boss, Linda Reynolds, testified Pamela had informed her that she was in an abusive relationship and was afraid to leave Dorsey. Specifically, Pamela told her that Dorsey on one occasion "held a gun to her head ... actually put a gun into her mouth and threatened her and that she was indeed afraid for her life." In late April 1996, Pamela asked Linda Reynolds for the name of a good divorce attorney. According to Reynolds, Pamela stated that Dorsey had threatened to take the little boy away. At a seminar on May 13, 1996, the day before the murder, Pamela told Reynolds that she

had informed Dorsey the night before that she would be leaving him. She also indicated to Reynolds she was apprehensive about going home that night, because she was afraid Dorsey might have run off with Connor.

Sherry Scarborough, another co-worker, testified Pamela had told her in mid-April that Dorsey was physically abusive toward her. Pamela described for Sherry how Dorsey had once grabbed her by the throat and left marks on her neck. Sherry also indicated Pamela told her that Dorsey had previously held a gun to her head and under her throat and threatened to kill her.

Other witnesses testified for the State. Amy Patane, the Dorseys' neighbor, who had a child about the same age as Connor Dorsey, testified she never saw Connor play with guns or indicate any interest in guns. David Davis, a friend of Dorsey's, testified he had seen bruises on Pamela's *927 neck and was also aware of a bloody fight that occurred between Dorsey and Pamela at Davis's house some six years earlier. According to Davis, Pamela at one point broke Dorsey's nose.

[8] [9] Dorsey is correct in asserting that, by itself, mere presence at the scene of the crime is not sufficient to support a conviction for murder. See Thomas v. State, 645 S.W.2d 798, 800 (Tex.Crim.App.1983). It is, however, a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant, or, as in this case, the perpetrator. Id. Here, the evidence shows much more than Dorsey's

mere presence at the scene of the crime. Evidence from various witnesses reveals the history of the abusive relationship described above. Although Dorsey claimed the young child shot his mother, the videotape revealed the child could not get the gun from the holster and could not shoot it in the uncocked position. Another witness described a bloody fight between Dorsey and Pamela and testified Dorsey told him he would kill Pamela if she ever left with the child. The autopsy report reveals the presence of bruising on the neck, around the right eye and left temple, as well as the presence of petechiae in the whites of the eye, indicating choking, strangulation, or ligature.

Because a rational trier of fact could have found the essential elements of murder beyond a reasonable doubt, there is legally sufficient evidence to support the verdict. After reviewing all of the evidence, we cannot say that the jury's verdict of guilt is so against the overwhelming weight of the evidence as to be manifestly unjust. The evidence is factually sufficient as well. Point of error twenty-one is overruled.

In our sufficiency review, we have, as required, considered all the evidence, even improperly admitted evidence, keeping in mind the binding legal concept that mere presence alone at the scene of the crime is insufficient to establish guilt. We now turn to consider evidence that was erroneously admitted at trial and the substantial and injurious effect that this improperly admitted evidence had upon the jury verdict.

[10] [11] In point of error twelve, Dorsey contends the "trial court erred in allowing inadmissible hearsay statements of the deceased victim" into evidence. In his brief on appeal, he characterizes the statements Pamela made to co-workers and friends as follows: "she had been seeking a divorce"; "she and appellant had not been getting along"; "appellant had been abusive towards her"; "she was afraid to divorce appellant"; "she thought appellant had followed her on some occasions"; "appellant had threatened to kill her"; "appellant had once held a knife to her throat" and; "she believed that if anything strange happened to her, like a weird car accident, it meant Dorsey had killed her."

[12] Under each of the listed categories, appellant refers us to certain pages in the record which contain specific hearsay statements objected to at trial. Included within those references, three of which are listed above, are the following: Pamela's statement that Dorsey held her down on the bed with a knife to her throat; her statement that Dorsey held a gun to her head, up under her throat, and in her mouth; her statement that if anything ever happened to her, it meant that Dorsey had killed her; and her statement that Dorsey followed her every day to work to make certain she was there.FN3

FN3. On cross examination, trial counsel attempted to mitigate the damaging testimony elicited by the State during direct examination regarding the gun to the mouth, head, and throat. In so doing, he opened the door to more details regarding the

incidents. However, appellant does not waive the harmful effect of improperly admitted evidence when he seeks to meet, destroy, or explain it. See Edwards v. State, 813 S.W.2d 572, 576 (Tex.App.-Dallas 1991, pet. ref'd).

*928 [13] [14] The trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard on appeal. See Coffin v. State, 885 S.W.2d 140, 149 (Tex.Crim.App.1994). A reviewing court should not reverse a trial judge whose ruling was within the "zone of reasonable disagreement." Green v. State, 934 S.W.2d 92, 101 (Tex.Crim.App.1996) (quoting Montgomery v. State, 810 S.W.2d 372, 379-80, 391 (Tex.Crim.App.1990)).

Dorsey objected to the admission of the testimony on hearsay grounds. The State claimed the evidence was admissible under Tex.R. Evid. 803(3), the "state of mind" exception to the hearsay rule, quoted below:

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

[15] The statements that appellant places at

issue in point of error twelve contain portions that are admissible under Rule 803(3) exception and portions that are not.FN4 "Statements of intent by the declarant [Pamela Dorsey] to prove future conduct are generally admissible when the future conduct is relevant to some aspect of the case." Wilks v. State, 983 S.W.2d 863, 865 (Tex.App.-Corpus Christi 1998, no pet.); see also Vann v. State, 853 S.W.2d 243, 250 (Tex.App.-Corpus Christi 1993, pet. ref'd) (Victim's statement that he was not happy in his marriage and wanted to find a way out was admissible as a statement of his emotional state and intent to act.) Reynold's testimony that Pamela said she was thinking of leaving Dorsey and wanted the name of a divorce attorney is admissible under Rule 803(3), since it shows her future intent to leave Dorsey. Likewise, the hearsay testimony describing Pamela's fear of Dorsey is admissible under Rule 803(3) to show her emotional state or "mental feeling" at the time she made the statement. Id. FN4. We acknowledge the existence of cases holding that "hearsay statements of the deceased are not admissible in a prosecution for murder of a wife." See Jones v. State, 515 S.W.2d 126, 128 (Tex.Crim.App.1974) (citing as examples of this rule's application several cases holding that the contents of divorce petitions filed by the deceased, annulment petitions filed by the deceased, and the contents of temporary restraining orders against the defendant sought by the deceased are inadmissible hearsay). "Such a blanket exclusion of statements made by the deceased spouse encourages automatic exclusion of this evidence without analysis of whether the statements may nevertheless be admissible pursuant to an exception to the hearsay

rule." Williams v. State, 927 S.W.2d 752, 760 (Tex.App.-El Paso 1996, pet. ref'd). We do not adhere to a blanket exclusion rule, but instead analyze the statements pursuant to the rules of evidence.

[16] We reach a different conclusion, however, regarding the testimony recounting Pamela's statement that if anything strange happened to her, like a car crash, it meant that Dorsey had killed her. Because the out-of-court statement represents a belief held by Pamela, we conclude it does not fall under the exception in Rule 803(3). See Vann, 853 S.W.2d at 250 (Deceased's statement that he "wouldn't be surprised if Cherie was waiting for me at home with a gun and shot me" was not admissible under Rule 803(3), because it went beyond his state of mind and entered the realm of his belief.); see also Barnum v. State, 7 S.W.3d 782 (Tex.App.-Amarillo 1999, no pet. h.) (Deceased's statement that she believed her husband might be planning to murder her for life insurance proceeds was a statement of belief and not admissible under Rule 803(3)).

[17] Likewise, inadmissible are Pamela's out-of-court statements that Dorsey had once held her down on the bed with a knife to her throat, that he held a gun to *929 her head and throat and had put a gun into her mouth, and that he followed her every day to work to make certain she was there. Such statements are not reflective of her state of mind or a belief, but simply recount her memory of events. See Navarro v. State, 863 S.W.2d 191 (Tex.App.-Austin 1993), pet. ref'd, 891 S.W.2d 648 (Tex.Crim.App.1994). (Deceased's statements to

her mother that appellant put a gun to her head and threatened to kill her are statements of memory to prove the fact remembered and not admissible under Rule 803(3)); Buhl v. State, 960 S.W.2d 927, 932 (Tex. App.-Waco 1998, pet. ref'd) (Trial court was correct in excluding testimony by a witness, that defendant had said he was afraid of victim because victim pulled guns on him, since relevance of victim's out-of-court statement hinged on truthfulness of his assertion that victim had, in fact, pulled guns on him.).

The statements herein were not reflective of Pamela's state of mind but instead were her memories of specific events. They were not admissible under Rule 803(3). Quoting Justice Cardozo, the Court of Appeals pointed out in Gibbs v. State, 819 S.W.2d 821, 837 (Tex.Crim.App.1991), cert. denied 502 U.S. 1107, 112 S.Ct. 1205, 117 L.Ed.2d 444 (1992) that if the distinction between state of mind and a statement of "memory or belief to prove the fact remembered or believed" is ignored, "there would be an end, or nearly that, to the rule against hearsay."

The State refers us to our holding in Williams v. State, 798 S.W.2d 368 (Tex. App.-Beaumont 1990, no pet.). There, this Court found a witness's testimony regarding the victim's out-of-court statements to be admissible under the state of mind exception to the hearsay rule. We find the Williams case distinguishable from the instant case. In Williams, the victim testified as the State's last witness. Prior to her testimony, the State called as a witness the

deputy who had been dispatched to the hospital to speak with the victim shortly after she reported the sexual assault to the authorities. The deputy testified that during the interview at the hospital the victim was crying, shaking, and scared, and she kept telling the deputy that he (the defendant) was going to kill her. The deputy further indicated the victim was very disturbed. We characterized the officer's testimony as a description of the victim's emotional state and found it admissible under Rule 803(3).

In the instant case, the testimony of the three witnesses regarding the statements mentioned above does not reflect a description of Pamela's emotional state. Instead, the statements are simply a description of three specific incidents ---- Dorsey's holding Pamela down on the bed with a knife to her throat, his holding a gun to her head, throat, and mouth, and his following her to work every day ---- and, in the other instance, a specific belief ---- that if she died in some unusual way, Dorsey would have been the one who killed her.

[18] [19] It is true that evidence from other witnesses indicating domestic violence in the Dorsey home came in otherwise. It is also well established that the improper admission of evidence does not constitute reversible error if the same facts are proved by other properly admitted evidence. See Anderson v. State, 717 S.W.2d 622, 628 (Tex.Crim.App.1986); *Couchman v. State*, 3 S.W.3d 155, 160-61 (Tex. App.-Fort Worth 1999, pet. ref'd). However, that evidence is not the same or even substantially similar to this evidence. The holding of

a knife to Pamela's throat and a gun to her head, mouth, and throat is of a different character altogether. We, therefore, conclude the trial court abused its discretion in admitting the hearsay testimony, because the statements do not fall within the exception to Rule 803(3), and the same or similar evidence did not come in otherwise. As a result, the trial court's decision to admit the evidence was not within the zone of reasonable disagreement. We must, therefore, determine *930 whether, under Tex.R.App. 44.2(b), the error is harmful.

[20] [21] Under Rule 44.2(b), we disregard the error if it does not affect Dorsey's substantial rights. Mosley v. State, 983 S.W.2d 249, 259 (Tex.Crim.App.1998). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. See King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). We review the record as a whole to determine whether the error had such an influence on the jury's verdict. Mosley, 983 S.W.2d at 259.

The record in this case reveals a 911 call in which Dorsey reported his wife had been accidently shot by their son. The record also contains evidence of domestic violence between Pamela and Dorsey, as well as testimony regarding Pamela's fear of Dorsey, her intent to seek out a divorce lawyer, and Dorsey's threat to kill her. The autopsy report reveals Pamela had unexplained bruises, as well as petechiae in her eyes, which Dr. Parangao testified raised a red flag in his mind. None of this evidence, however, has the

specificity and directness, at least in terms of inculpating appellant, as does the inadmissible hearsay evidence described herein. Graphic evidence of specific abusive incidents was extremely prejudicial and damaging in view of the fact that the cause of Pamela's death was a gunshot wound to the back of the head. Clearly, Pamela's memories of specific abusive incidents, similar to the type of abuse that resulted in her death, along with her belief that Dorsey would be responsible for her death, would have a telling effect upon the jury.

We note the evidence in this case was entirely circumstantial; there were no eyewitnesses that testified at trial. The defense proffered by Dorsey was that he did not do it; there was no claim that he accidentally shot Pamela or that he shot her in self-defense. While the evidence of Dorsey's guilt may have been compelling, it was not overwhelming. The State relied upon the hearsay statements of co-workers and friends to weave a story of abuse and fear. Critical in the plot were the hearsay statements described herein. Not only was the inadmissible hearsay evidence extremely prejudicial, given the State's theory of the case, it also tended to negate the defensive theory offered by appellant and to cause the jury to convict on the basis of inadmissible evidence.

We have grave doubts about the effect of the erroneously admitted evidence and find its admission had a substantial and injurious effect on the verdict. Point of error twelve is sustained, and the case is remanded to the trial court for a new trial. We need not address the remaining points of

error, because sustaining any one of them would not afford any greater relief.

We reverse the judgment and remand the case for a new trial.

REVERSED AND REMANDED.

RONALD L. WALKER, Chief Justice, concurring. The admissibility or inadmissibility of hearsay evidence began many years ago as a plague upon human understanding, presently having evolved into endless circumambulation to the point that one's battery goes dead from honking at one's own tail-lights.

The proffered and admitted evidence in the instant case consisted of statements allegedly made by the decedent, Pamela Dorsey, to friends and co-workers. These statements are set out in the majority's opinion. The majority does an excellent job addressing each of the hearsay statements elicited by the State or necessarily injected by appellant's counsel in mitigation. Under present case law, I believe it safe to say that sometimes a decedent may speak from the grave and sometimes they must remain forever silent even to the point of freeing their killer. As the majority sets out, the decedent Pamela Dorsey may speak posthumously that she feared *931 appellant and was contemplating divorce. However, when it comes to Pamela's statement regarding those acts that created her fear, (appellant putting a gun to her head, threatening to kill her, placing a knife to her throat, etc.), we are compelled to conclude that under

Tex.R. Evid. 803(3), Pamela should not speak, for indeed such hearsay is only a recounting of events to prove the fact remembered, i.e., Pamela's fear of appellant.

My concurrence is for the purpose of pointing out the irony, and perhaps the injustice of 803(3), as applied to the present case.

Ironically, under 803(3), were the present case one involving the question of whether appellant unduly influenced Pamela in the execution of her will, the hearsay statements of decedent that she executed same because appellant held a knife to her throat and a gun to her head, would be admissible under 803(3). Not so however, in a case where appellant is charged with the execution of Pamela, to wit: killing her with a gun.

The rule needs revisiting in situations where a party is charged with the death of declarant.

Tex.App.-Beaumont,2000.
Dorsey v. State
24 S.W.3d 921
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Appendix B

117 S.W.3d 332
Court of Appeals of Texas,
Beaumont.
Charles Ray DORSEY, Appellant,
v.
The STATE of Texas, Appellee.
No. 09-02-023 CR.
Submitted May 13, 2003.
Decided Aug. 28, 2003

Defendant was convicted of murder, and he appealed. The Court of Appeals, 24 S.W.3d 921, reversed and remanded for new trial. Defendant was re-convicted in the 284th District Court, Montgomery County, Putnam Reiter, J., of murder and jury assessed punishment of 40 years' confinement. Defendant appealed. The Court of Appeals, John T. Boyd, J. (Assigned), held that: (1) probative value of evidence that defendant had rented movie with plot similar to events surrounding murder was not substantially outweighed by its prejudicial effect; (2) trial court did not abuse its discretion in admitting videotape of defendant's infant son's interaction with murder weapon; (3) hearsay testimony describing victim's fear of defendant was admissible under state of mind exception; and (4) indictment charging that defendant caused death of victim "by shooting her" did not allege a deadly weapon so as to permit verdict of "guilty as charged in the indictment" to be considered an affirmative deadly weapon finding for entry on the judgment.

Affirmed as modified.
David B. Gaultney, J., filed concurring opinion.
West Headnotes

[1] KeyCite Notes
⇦203 Homicide
⇦203IX Evidence
⇦203IX(D) Admissibility in General
⇦203k985 Intent, Malice, Deliberation, and Premeditation
⇦203k991 k. Preparations. Most Cited Cases

⇦203 Homicide KeyCite Notes
⇦203IX Evidence
⇦203IX(D) Admissibility in General
⇦203k1000 Motive
⇦203k1001 k. In General. Most Cited Cases
Evidence in murder trial that defendant had rented movie with plot similar to events surrounding murder was relevant and admissible to show defendant's motive and intent and that shooting was not result of accidental firing by defendant's son. Rules of Evid., Rules 401, 402.

[2] KeyCite Notes
⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(D) Facts in Issue and Relevance
⇦110k338 Relevancy in General
⇦110k338(7) k. Evidence Calculated to Create Prejudice Against or Sympathy for Accused. Most Cited Cases
Probative value of evidence in murder trial that defendant had rented movie with plot similar to events surrounding murder was not substantially

outweighed by its prejudicial effect; ultimate issue of whether defendant's wife was shot by accident or whether defendant was actual killer was hotly contested, only brief testimony about movie was admitted rather than movie itself, and because movie concerned a fictional murder, it was unlikely jury used it for anything other than purpose for which it was admitted . Rules of Evid., Rule 403.

[3] KeyCite Notes

⇦110 Criminal Law

⇦110XVII Evidence

⇦110XVII(P) Documentary Evidence

⇦110k431 Private Writings and Publications

⇦110k438 Photographs and Other Pictures

⇦110k438(8) k. Special Types of Photographs; Enlargements, Motion and Sound Pictures, X-Rays. Most Cited Cases

Trial court did not abuse its discretion in admitting videotape during murder trial of defendant's infant son's interaction with holstered gun used in victim's shooting; defendant presented vigorous defense supporting assertion that fatal shots were accidentally fired by his son, events depicted on tape were not re-enactment of crime itself, tape was taken after crime, and weight to be given events depicted was matter within purview of jury as fact-finder.

[4] KeyCite Notes

⇦110 Criminal Law

⇦110XXIV Review

⇦110XXIV(N) Discretion of Lower Court

⇦110k1153 Reception and Admissibility of Evidence; Witnesses

⇦110k1153(1) k. In General. Most Cited Cases

Trial court's ruling on admission of evidence is measured by abuse of discretion standard and its ruling should not be reversed if ruling is within "zone of reasonable disagreement."

[5] KeyCite Notes

⇦110 Criminal Law
⇦110XXIV Review
⇦110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
⇦110XXIV(E)1 In General
⇦110k1036 Evidence
⇦110k1036.5 k. Hearsay. Most Cited Cases

Defendant failed to preserve for appeal claim that trial court reversibly erred during murder trial in admitting victim's out-of-court statements that defendant threatened her that he was going to take their child away, where defendant failed to object when evidence was introduced at trial. Rules App.Proc., Rule 33.1.

[6] KeyCite Notes

⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(N) Hearsay
⇦110k419 Hearsay in General
⇦110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Hearsay testimony describing victim's fear of defendant, who was her husband, was admissible in murder prosecution under state of mind exception to rule against hearsay to show victim's emotional state or mental feeling at time she made statement.

Rules of Evid., Rule 803(3).

[7] KeyCite Notes

⇦203 Homicide

⇦203IX Evidence

⇦203IX(D) Admissibility in General

⇦203k966 Threats by Accused

⇦203k967 k. In General. Most Cited Cases

⇦203 Homicide KeyCite Notes

⇦203IX Evidence

⇦203IX(D) Admissibility in General

⇦203k985 Intent, Malice, Deliberation, and Premeditation

⇦203k989 Previous Threats and Expressions of Ill Will by Accused

⇦203k989(1) k. In General. Most Cited Cases

⇦203 Homicide KeyCite Notes

⇦203IX Evidence

⇦203IX(D) Admissibility in General

⇦203k1000 Motive

⇦203k1005 k. Discord Between Spouses or Cohabitants. Most Cited Cases

Evidence in murder trial that defendant told witness, who was familiar with defendant's poor relationship with victim, that "he would pull the trigger first," in response to witness's statement that defendant and victim were going to kill each other, was relevant and admissible to show absence of mistake or accident as well as motive and intent. Rules of Evid., Rules 401, 402.

[8] KeyCite Notes

⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(R) Opinion Evidence
⇦110k477 Competency of Experts
⇦110k479 k. Bodily and Mental Condition. Most Cited Cases

Trial court did not abuse its discretion during murder trial in excluding expert's testimony regarding defendant's infant son's motor skills ability; expert's testimony was based upon various studies and, other than viewing two videotapes of child, he had never actually seen and tested child nor had he personally conducted any grip strength test on any child or children actually equivalent to son in age and fitness. Rules of Evid. Rule 702.

[9] KeyCite Notes
⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(R) Opinion Evidence
⇦110k468 Subjects of Expert Testimony
⇦110k469.1 k. Aid to Jury. Most Cited Cases
In addressing admissibility of expert evidence, trial court's first task is to determine whether testimony is sufficiently reliable and relevant to help jury in reaching accurate results; thus, testimony must be sufficiently tied to facts to meet simple requirement that it be helpful to jury.

[10] KeyCite Notes
⇦350H Sentencing and Punishment
⇦350HII Sentencing Proceedings in General
⇦350HII(G) Hearing
⇦350Hk369 Findings and Statement of Reasons

350Hk373 k. Sufficiency. Most Cited Cases
Indictment charging that defendant caused death of victim "by shooting her" did not allege a deadly weapon so as to permit verdict of "guilty as charged in the indictment" to be considered an affirmative deadly weapon finding for entry on the judgment. Vernon's Ann.Texas C.C.P. art. 42.12.

*333 James B. Parks, Law Office of Jimmy B. Parks, Jr., and Kimberly S. Keller, The Keller Group, San Antonio, for Appellant.

Michael A. McDougal, Dist. Atty., Mike Griffin and Gail Kikawa McConnell, Asst. Dist. Attys., Conroe, for State.

Before BURGESS, GAULTNEY and BOYD, JJ.

OPINION

JOHN T. BOYD FN*, Justice.
FN* The Honorable John T. Boyd, sitting by assignment pursuant to Tex. Gov't Code Ann. § 74.003(b) (Vernon 1998).
In this appeal, appellant Charles Ray Dorsey challenges his conviction of murder and the jury-assessed punishment of forty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. In pursuing his appeal, he presents sixteen issues for our determination. We will discuss those issues sequentially as their decision may become necessary to the disposition of this appeal. For reasons hereinafter stated, we modify the judgment of the trial court. As modified, the judgment is affirmed.

*334 Early on the morning of May 14, 1996, appellant Charles Dorsey called 911 and reported that his wife Pamela had been shot. When the operator queried if the person who shot her was still present, appellant replied, "It's my little boy. He got in her purse and got her gun." DeLane Potter, a patrol security officer for appellant's residential subdivision, who was first on the scene, testified that he found Pamela in the bedroom, lying face down on the bed covered up to her neck with a blanket and sheet. He testified that when he arrived, appellant was very upset and the couple's child, two and one-half years old at the time, was confused and disoriented. There was evidence that Pamela died as a result of a gunshot wound to the head. Other portions of the rather extensive evidence will be referred to as it may become necessary to a discussion of the questions presented in this appeal.

[1] [2] In his first four issues, appellant contends the trial court reversibly erred in admitting evidence of the movie **Never Talk to Strangers** (Columbia/Tristar 1995) because 1) it amounted to a comment on the weight of the evidence, 2) it was irrelevant, 3) it was in violation of Texas Rule of Evidence 404(b), and 4) its probative value was exceeded by its prejudicial value. Because they are interrelated, appellant argues them together. We will likewise consider them together.

As an appellate court, we review the trial court's decision **to admit or exclude evidence under an abuse of discretion standard**, and we may not reverse a trial court if its ruling was within the zone

of reasonable disagreement. See Green v. State, 934 S.W.2d 92, 101-02 (Tex.Crim.App.1996). Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex.R. Evid. 401. Rule 402 provides that all relevant evidence is admissible except as otherwise provided by the Constitution, by statute, by the rules of evidence or by any other rules adopted pursuant to statutory authority. See Tex.R. Evid. 402. In applicable part, Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tex.R. Evid. 403. In relevant part, Rule 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in conformity therewith. Such evidence, however, may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Tex.R. Evid. 404(b).

At trial, and after the State had presented its case in chief, appellant presented a vigorous defense supporting his assertion that the fatal shots were accidentally fired by his infant son. As a part of the State's rebuttal evidence, Montgomery County Sheriff's Detective Bonnie Tidwell was allowed to testify, over objection, that she had viewed the movie Never Talk to Strangers. In particular, she said the movie concerned a female psychiatrist who has a flash back in which she remembers that when

she was a child, her father "tells the little girl [the psychiatrist] to stay with him. He takes her in front of him, has a gun in his hand, takes the little girl's hands that's on the weapon, on the trigger, puts his hands over hers, pulls the trigger and kills her mother." Subsequently, "she [the psychiatrist] killed her father and the police officer [with whom she had been involved]. And then she went on with her life."

*335 Appellant initially argues that the State failed to offer evidence that appellant had ever watched the movie or was aware of the movie's plot, thus the probative value, if any, arising from the movie was substantially outweighed by its prejudicial effect. To lay a predicate for the movie's admission, the State produced Peggy Sue McRae, a clerk at the "Take One Video" in May of 1996. Ms. McRae testified that the records of the video rental company showed that the movie was checked out by appellant on May 5, 1996, and was returned on May 6, 1996, approximately one week prior to the death of Pamela Dorsey. When she read about the circumstances of the shooting in the newspapers, her curiosity was piqued, she looked at Charles and Pamela Dorsey's account, noticed that the last rental was the movie in question, and told her supervisor that "the rental of this movie ... might be pertinent to this case." Subsequently, the records of Take One Video relating to the rental were subpoenaed.

At trial, on direct examination by the State, McRae's testimony that she checked the movie out to appellant was unequivocal. When cross-examined about testimony in a prior trial of this case in which the record showed she had said she rented the movie

to Pam and Chad Dorsey (appellant), McRae averred she did not remember that prior testimony, and reiterated that her present testimony as to the person to whom the movie was checked out was correct. Under redirect testimony, she testified that she particularly remembered the occasion because of the death of appellant's wife the week after the movie was rented, and that appellant had some physical characteristics that were "substantially different" from any of the other renters with whom she had contact. Even assuming there may have been conflicts between her testimony in the first trial and her testimony in this one, her testimony was still sufficient to bring it within the jury's exclusive province of resolving conflicts and assessing the credibility of the testimony and the weight to be given it.

In supporting his position that the admission of the testimony requires reversal, appellant argues that the only evidence connecting appellant with the movie was the "conflicting" testimony of the clerk. He reasons that even viewing her testimony in a light most favorable to the State, the State failed to bring any evidence that appellant actually watched the movie or was aware of the plot. As highlighting the differences in a proper predicate laid for the admission of movies, and the predicate laid here, appellant cites two cases, namely Morton v. State, 761 S.W.2d 876 (Tex.App.-Austin 1988, pet. ref'd), and Parrish v. State, 950 S.W.2d 720 (Tex.App.-Fort Worth 1997, no pet.). That reliance warrants a discussion of the cases.

In Morton, the State's theory was that Morton had

killed his wife in a fit of sexual frustration and anger after she had refused him sex. Morton, 761 S.W.2d at 877. In the appeal, the court addressed Morton's contention that a statement, in which he admitted that he and his wife had watched a sexually explicit movie prior to her rejection of him, was involuntary and not admissible. Id. at 878-79. It was in that context that the appellate court held Morton's statement was voluntary and properly admitted. Id. at 879. Because the statement was admissible, it was uncontroverted that Morton had watched the film, and thus the court had no occasion to discuss or consider the predicate necessary in an instance such as that before us. Indeed, more relevant is the court's discussion in which it held that the case depended upon circumstantial evidence and in such a case, the probative value of the portion of the film admitted exceeded its prejudicial effect. Id. at 881. Of course, *336 the instant case is also a circumstantial one.

In Parrish, the State's theory was that appellant had murdered his wife to collect on her life insurance policy. Parrish, 950 S.W.2d at 721. The videotape in question there was made by the appellant and revealed that he had thought about collecting death benefits by defrauding an insurance company. Id. at 723-24. The court was concerned with the question whether the probative value of the evidence was outweighed by its prejudicial effect. Id. It concluded that the tape was admissible and relevant in establishing Parrish's intent, preparation, and plan to commit the crime charged. Id. at 724. The court had no occasion to discuss the requisites of a proper predicate in such a case because it was undisputed

that the appellant had created the video. Rather, the court's primary concern was whether the prejudicial value of the video exceeded its probative value. The court concluded the tape was relevant as establishing the defendant's intent, preparation, and plan to commit the crime charged. In the course of its opinion, it noted, to the extent the evidence was prejudicial, "such is the inherent nature of evidence used by the State to prove its case." Id.

It is axiomatic that determining the credibility of evidence and the weight to be given that testimony is within the province of the jury. In this circumstantial evidence case, the evidence was relevant and admissible to show appellant's motive and intent and that the shooting was not the result of an accidental firing by his two and one-half year old son. It was also sufficient to justify a reasonable conclusion that appellant did rent the film, did so for the purpose of viewing it, and that he viewed it.

Having made that decision, it now becomes necessary to review appellant's contention that the prejudicial effect substantially outweighed its probative value. In the seminal case of Taylor v. State, 920 S.W.2d 319, 322 (Tex.Crim.App.1996), the Court of Criminal Appeals explicated that in making a determination of this kind, the reviewing court should consider: "1) whether the ultimate issue was seriously contested by the opponent of the evidence; 2) whether the State had other convincing evidence to establish the ultimate issue to which the disputed evidence was relevant; 3) the compelling nature, or lack thereof, of the evidence; and 4) the likelihood that the evidence was of such a nature to impair the

efficacy of a limiting instruction." Id. at 322.

In applying those factors, first, the ultimate issue here, i.e., whether appellant's wife was shot by accident or whether appellant was the actual killer, was hotly contested. Second, the State had no other convincing evidence as to why appellant would say his small son shot Pamela. Third, only brief testimony about the movie was admitted rather than the movie itself. Fourth, because the movie concerned a fictional murder, it is unlikely that the jury would have used it for anything other than the purpose for which it was admitted. We conclude that in this circumstantial evidence case, the probative value of the evidence was not substantially outweighed by its prejudicial value. Thus, the trial court did not abuse its discretion in admitting the tape. Appellant's first four issues are overruled.

[3] Appellant's next six issues concern the admission into evidence of a video tape of his son Conner's interaction with the holstered gun used in Pamela's shooting. The purpose of the tape was to determine whether Conner had the physical capability of pulling the trigger of the gun. The tape showed that Conner had the physical capability of pulling the trigger of the gun *337 when the hammer was cocked but could not do so when the gun was not cocked. It also showed that Conner could not open the holster when it was strapped shut.

The issues are interrelated and we will discuss them together. In issues five and six, appellant contends his federal and state due process rights were violated because the State maintained inconsistent

positions between the first trial FN1 and the second trial of this case. In his seventh, eighth, ninth, and tenth issues, appellant argues the trial court reversibly erred in denying his motion to suppress the video tape because it constituted an improper experiment, it constituted an improper interview, it constituted hearsay, and the tape was obtained in violation of a valid court order.

> FN1. In the first trial, appellant's conviction was reversed by the Beaumont Court of Appeals. See Dorsey v. State, 24 S.W.3d 921, 930 (Tex.App.-Beaumont 2000, no pet.). The tape was shot in an interview room at the sheriff's office. In the course of overruling appellant's objection to the admission of the tape, having previously viewed the tape, the trial court made findings that: 1) it was immaterial whether the taped episode was called an experiment or an interview; 2) significant factors were "the presence of the child, gun, holster, lighted room, apparently no pressure exerted one way or the other by anyone on the child;" and 3) it was not relevant whether the episode was filmed in a room that did not have a bed, whether or not there was a body there, and whether or not it looked like the room in which the decedent expired. Indeed, he opined, where the tape was shot was more conducive to a reasonable, realistic result than if it had occurred in the bedroom where the child may have had memories.

The record contains Officer Tidwell's description of the events shown on the tape. Other than the

general objections to the admission of the tape we have noted, appellant initially made no objection to the narration of the events depicted. Tidwell's narrative was made as the tape was running before the jury and they could observe themselves what was taking place. Tidwell initially described the child running in front of her into the room. He picked up a couple of dolls that were in the room, looked at them briefly, threw them away, and went to the gun. It was not until that point that appellant objected to Ms. Tidwell's narrative of the events being shown on the tape. His objection was that "the tape which is in evidence speaks for itself." That objection was not timely.

The tape continued to the point where the child picked up the weapon and attempted to open the strap part on the holster. Ms. Tidwell then narrated that when the child could not open the holster because of the strap on it, "we both together got it open and he took the weapon out of the holster and began to look at it." She described the child's unsuccessful efforts to cock the double action pistol or to pull the trigger when it was uncocked.

Appellant initially argues that the State maintained inconsistent positions between the first and second trials "as to whether Conner's video tape was an interview or whether it was an experiment." He posits that the difference in the terms occurred after his initial objection. The change in terminology, he contends, was material and adversely affected his due process rights because if the occurrence was an experiment, "it raised the legal issues regarding the legal requirements of an admissible police

experiment." As best we understand, he reasons that the State's transition to the term "interview" was an attempt "to shield itself from the legal requirements of an admissible experiment" *338 and would lessen the State's burden to establish the admissibility of the evidence.

With regard to the admissibility of experiments, appellant cites and relies upon Marras v. State, 741 S.W.2d 395 (Tex.Crim.App.1987), overruled on other grounds by Garrett v. State, 851 S.W.2d 853 (Tex.Crim.App.1993); Esquivel v. State, 595 S.W.2d 516 (Tex.Crim.App.1980); and Lopez v. State, 651 S.W.2d 413 (Tex.App.-Fort Worth), rev'd and remanded on other grounds, 664 S.W.2d 85 (Tex.Crim.App.1983). These cases stand for the general principle that the results of an out-of-court experiment is admissible within the discretion of the trial court if the experiment was made under conditions similar to the event to which the results of the experiment relate. See Esquivel, 595 S.W.2d at 529. However, that principle is qualified by the fact that an experiment not made under exactly the same conditions goes to the weight and not the admissibility of the evidence. Id.

In arguing that the taped events were, in effect, a recreation of the crime, appellant places considerable reliance upon the statement by the Lopez court that "any staged, re-enacted criminal acts or defensive issues involving human beings" are "inherently dangerous, offer little in substance and the impact of re-enactments are too highly prejudicial to insure the State or the defendant a fair trial." Lopez, 651 S.W.2d at 416. We find the

reasoning the court employed in Marras helpful in considering this argument. In Marras, a capital murder case, the court was concerned with a videotape that showed the area through which an eyewitness walked after the witness viewed the crime. Marras, 741 S.W.2d at 404. The events shown on the tape were narrated by the witness as it was shown. Id. Marras had objected to the admission of the tape on the basis that the tape was not an accurate "duplication" and asked the appellate court to apply the reasoning of the Lopez court and hold the trial court erred in admitting the tape. Id. In considering that argument, although approving the Lopez explication, the Marras court said because the tape only showed the route taken by the witness and the accused after the crime was actually committed, it did "not depict any staged, re-enacted criminal acts" and the trial court did not abuse its discretion in admitting the tape. Id. Regardless of the nomenclature of the events pictured in the tape here, the reasoning employed by the Marras court is applicable. The events depicted on the tape were not a re-enactment of the crime itself, the tape was taken after the crime, and the weight to be given the events depicted was a matter within the purview of the jury as fact-finder. The trial court did not abuse its discretion in admitting the tape. Appellant's fifth and sixth issues are overruled.

In his seventh, eighth, and ninth issues, appellant contends that the videotape was the result of an improper experiment or interview and thus was inadmissible as hearsay. In advancing that proposition, he initially reasons that the events shown on the tape were analogous to the child

testifying and, because the child was not placed under oath, nor was there any showing that he was competent to understand the obligation that court testimony be truthful, the tape was not admissible. We agree with the State that videotape of the activities of the child is comparable to the videotapes of a driver alleged to be intoxicated. The Court of Criminal Appeals has held visual depictions of sobriety tests are not testimonial and do not violate a defendant's federal or state constitutional right against self-incrimination. See Miffleton v. State, 777 S.W.2d 76, 80 (Tex.Crim.App.1989); see also Gassaway v. State, 957 S.W.2d 48, 50-51 (Tex.Crim.App.1997)(recitation of the alphabet*339 and counting backwards in sobriety tests are not testimonial in nature and thus are not within the purview of Fifth Amendment protection).

In this case, the videotape was played before the jury without sound. As we noted above, there was no attempt to recreate the actual shooting. That being so, and because the actions of the child were merely being observed, the rather strict restrictions governing the determination of the competency of child witnesses are not applicable here.

Appellant next contends that the child's activities in response to questions by Tidwell FN2 amounted to inadmissible hearsay. He argues the fact that the child responded to Tidwell's questions by actions rather than words does not mean that Conner was not communicating with Tidwell. Thus, any opinion arrived at by Tidwell as to the child's ability to pull the trigger of the gun must necessarily be based upon the child's out-of-court conduct, i.e.,

inadmissible hearsay. To support that argument, appellant cites and relies upon D.L.N. v. State, 590 S.W.2d 820 (Tex.Civ.App.-Dallas 1979, no writ), a prosecution for alleged deviate sexual intercourse. However, that case is distinguishable. In D.L.N., in response to questions asked by the prosecution, the father of the complainant was allowed to testify about the child's re-enactment of the acts giving rise to the prosecution. Id. at 822. A minister was also present at the time and was allowed to testify about the child's actions in response to the questions. Id. It was in that context the appellate court decided the testimony was inadmissible hearsay. Id. In the instant case, none of the circumstances of appellant's version of the shooting were attempted to be re-enacted. Rather, the child simply performed physical responses that, when viewed by the jury, were relevant and admissible to aid them in assessing the credibility of appellant's testimony. Appellant's seventh, eighth, and ninth issues are overruled.
FN2. The jury did not hear the audio on the videotape.
In his tenth issue, without citation of case authority, appellant complains that the trial court reversibly erred in denying his motion to suppress the videotape described above because it was allegedly obtained in violation of a court order. The failure to cite relevant authority could result in the waiver of this issue. See Tex.R.App. P. 38.1(h); Salazar v. State, 38 S.W.3d 141, 147 (Tex.Crim.App.2001). However, because of appellant's diligent briefing on other issues, in the interest of justice, we will consider the question presented. The record reveals that Child Protective Services took custody of Conner under an emergency order on May 24, 1996.

A hearing was held on the matter on the morning of May 28, 1996, the next working day. As a result of the hearing, custody of the child was awarded to Conner's maternal grandparents.

At the suppression hearing, James McClure, the child's maternal grandfather testified. He averred he was present when the judge awarded custody of Conner to him and his wife, although they did not pick the child up until 6:00 or 7:00 in the evening of May 28. He said that at the hearing, the District Attorney had asked them to come to his office. When the couple arrived at the District Attorney's office, they were told that the authorities did not know exactly where Conner was at the time because the person in possession of him was "shopping or something." They were informed the authorities would let them know as soon as they contacted "her." Evidently, that reference was to the person with whom the child had been temporarily placed. When they were *340 later contacted, they were told to pick the child up at the Sheriff's office. In his testimony, McClure said that although no video taping was mentioned, he was told the Sheriff's Department wanted to see if Conner could handle the gun. His response was that would be fine, but he wanted them to do it before "I got ahold of him [the child] because I wanted to bring him back." Although McClure did not see the tape until later, when he did so, he said he was glad it was made and had no objection to it. Appellant's tenth issue is overruled.

[4] KC Appellant's eleventh, twelfth and thirteenth issues are also interrelated and will be considered by

us together. The gist of those issues is that the trial court reversibly erred in admitting Pamela's out-of-court statements that appellant would harm or kill her and her belief that appellant would take Conner away. As we have noted, a trial court's ruling on the admission of evidence is measured by an abuse of discretion standard. Its ruling should not be reversed if the ruling is within the "zone of reasonable disagreement." See Green, 934 S.W.2d at 101-02 (quoting Montgomery v. State, 810 S.W.2d 372, 379-80, (Tex.Crim.App.1990)). Moreover, there is a "state of mind" exception to the hearsay rule which is codified in Texas Rule of Evidence 803(3), That rule provides:

(3) Then existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In argument under this issue, appellant points out testimony the State elicited that Pamela was preparing to divorce appellant, that she believed appellant would harm or kill her, and that she believed appellant might take Conner away from her. He acknowledges that the testimony about Pamela's preparations for divorce fall within the "state of mind" hearsay exception. However, he argues, the testimony that Pamela believed Dorsey would harm or kill her or might take Conner away

did not fall within the "state of mind" exception and was not admissible.

In support of his argument that reversal is required, appellant made record citations to portions of the testimony of Linda Reynolds, Pamela's work supervisor, Sherri Scarpa, a former co-employee with Pamela, Rachel Courreage, another former co-employee of Pamela, and Melvin Franklin, a Montgomery County sheriff's detective. In reviewing the portions of the record upon which appellant cites and relies, we find no testimony elicited by the State that Pamela believed appellant would harm or kill her or words to that effect. The Rules of Appellate Procedure not only require a clear and concise argument for the contentions made, they also require appropriate citations to the authorities and to the record. See Tex.R.App. P. 38.1(h). Appellant's failure to comply with that requirement fails to preserve that portion of his issue for appellate review.

[5] With regard to appellant's threats to take Conner away from Pamela, appellant cites:

1. Ms. Reynold's testimony on November 6, 2001 that Pamela "was afraid that her husband would take Conner and run away with him and she would never see him again."

2. Ms. Scarpa's testimony on November 6, 2001, that Pamela "was fearful of her husband", and that she "was thinking*341 of leaving her husband, Chad, and that Chad had told her that he would take the baby to Scotland, should she leave."

Appellant made no trial objection to that testimony of Ms. Reynolds. Texas Rule of Appellate Procedure 33.1 requires a timely and specific objection to preserve a question for appellate review. Tex.R.App. P. 33.1. Texas Rule of Evidence 103 also provides that error may not be predicated upon a ruling admitting evidence without a timely objection or motion to strike unless the ruling is fundamental error. Tex.R. Evid. 103. Because of the lack of a timely and specific objection on the basis he now raises, appellant has failed to preserve the question for appellate review. See Wilson v. State, 7 S.W.3d 136, 145 (Tex.Crim.App.1999). Although appellant had made an earlier hearsay objection to portions of Ms. Scarpa's testimony, he did not ask for, and was not granted, a running objection to her testimony. He also made no such objection to this portion of Ms. Scarpa's testimony. By failing to do so, he did not preserve the hearsay question for our review. Parenthetically, he does not argue fundamental error.

Moreover, assuming arguendo that the question was preserved for our review, because Ms. Reynolds's earlier and similar testimony had been admitted without objection, any error in the admission of the later testimony was cured. See Ethington v. State, 819 S.W.2d 854, 858 (Tex.Crim.App.1991) (an error in admission of evidence is cured when the same evidence comes in elsewhere without objection).

[6] Additionally, in this court's earlier opinion, we held that hearsay testimony describing Pamela's fear of Dorsey was admissible to show her emotional

state or "mental feeling" at the time she made such statements. Dorsey, 24 S.W.3d at 928. We also held that certain statements that were not reflective of Pamela's state of mind but rather were her memories of specific events were not admissible under Rule 803(3). Id. at 929. In Barnes v. State, 56 S.W.3d 221, 231 (Tex.App.-Fort Worth 2001, pet. ref'd), with citation of the decisions of numerous sister courts, including the Dorsey decision, the court opined that a statement that the declarant is afraid or testimony demonstrating that the declarant was afraid when the statement is made is admissible under Rule 803(3).

The testimony which led to the reversal of the first trial of this case was, in our words, "not reflective of Pamela's state of mind but instead were her memories of specific events" and thus not admissible under Rule 803(3). Dorsey, 24 S.W.3d at 929. In contrast, the testimony in question here, namely, that Pamela was "fearful" of her husband or was afraid he might harm her, or that he might take Conner away were not related to memories of underlying specific events but were limited to her mental impressions. As such, even had the question been properly preserved for our review, the testimony was admissible. Appellant's eleventh, twelfth and thirteenth issues are overruled.

[7] In his fourteenth issue, appellant argues the trial court reversibly erred in admitting evidence of extraneous acts of appellant in violation of Texas Rule of Evidence 404(b). Tex.R. Evid. 404(b). Specifically, his complaint is about testimony elicited during the cross-examination of defense witness

Stacey Hert, the couple's Amway supervisor. During her direct examination, Stacey testified that she was visiting Pamela in the Dorsey home around the end of 1995 or in early 1996. As she visited, she saw Conner climb up on a counter, pull out a gun from Pamela's purse, and hold it in both hands. She said that frightened her, she told Pamela the child had the gun, and Pamela laughed and *342 took the gun away from Conner and replaced it in her purse.

On cross-examination, Stacy testified that on May 9, 1996, appellant came to her house to pick up some Amway products. Stacey testified that she was familiar with the couple's relationship and it was "not a good one" and "[t]hey argued all the time." On May 9, 1996, she and appellant had a discussion about their relationship and appellant said "[t]hat he would pull the trigger first."

On redirect examination by appellant, Stacy said that she had made a remark jokingly but his response was not joking. The record then shows the following colloquy between defense counsel and the witness:

Q. What did you say to him that got that response?

A. I said to him that, "One of these days you're going to open the paper and see 'April Sound [the location of their residence] couple found dead in their home, double suicide[.]' " And then I said, "No, it will be a double homicide, whenever you see it."

Although appellant admits the statement was admissible as an admission by a party opponent, he

argues it must also meet the requirements of Texas Rule of Evidence 404(b). Although that Rule excludes evidence of other crimes, wrongs, or acts introduced to prove conformity with that character, it does allow such evidence to show proof of motive, intent, opportunity, or absence of mistake or accident. In view of appellant's defense that the shooting was accidental, the testimony was clearly admissible to show the absence of mistake or accident as well as motive and intent. Moreover, statements of this nature are admissible in a murder trial under Texas Code of Criminal Procedure article 38.36(a). That article permits the State to offer testimony "as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." Tex.Code Crim. Proc. Ann. art. 38.36(a) (Vernon Supp.2003). Appellant's fourteenth issue is overruled.

[8] In his fifteenth issue, appellant argues the trial court reversibly erred in excluding the testimony of his expert witness Dr. Rex Frank, who, he says, would have testified about Conner's motor skills ability. Dr. Franks would have testified about the average grip strength of an average two and one-half year old child and whether such a child would have the strength to pull the trigger of a gun such as the one used in the shooting. After the State's objection to his testimony was sustained, appellant's careful trial lawyers included his testimony in a bill of exceptions and we have reviewed that testimony. The bill shows that the

doctor's testimony was based upon various studies and, other than viewing a video tape of the child mowing grass and the State's video we have discussed above, he had never actually seen and tested Conner nor had he personally conducted any grip strength test on any child or children actually equivalent to Conner in age and fitness.

[9] Texas Rule of Evidence 702 allows the admission of expert testimony such as this if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Tex.R. Evid. 702. Under the Rule, the proponent of the evidence must show by **clear and convincing evidence** that the evidence proffered is sufficiently relevant and reliable to assist the jury in that regard. See Weatherred v. State, 15 S.W.3d 540, 542 (Tex.Crim.App.2000). In addressing the admissibility of expert evidence, "the trial court's first task *343 is to determine whether the testimony is sufficiently reliable and relevant to help the jury in reaching accurate results." Kelly v. State, 824 S.W.2d 568, 572 (Tex.Crim.App.1992). Thus, "the testimony must be 'sufficiently tied to the facts to meet the simple requirement that it be "helpful" to the jury.' " Morales v. State, 32 S.W.3d 862, 865 (Tex.Crim.App.2000) (quoting Jordan v. State, 928 S.W.2d 550, 555 (Tex.Crim.App.1996)). We review a trial court's ruling on the admissibility of evidence under an abuse of discretion test and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. Weatherred, 15 S.W.3d at 542. Under this record, the trial court did not abuse its discretion in excluding the evidence. Appellant's fifteenth issue is overruled.

[10] In his sixteenth and final issue, appellant complains of the deadly weapon finding in the trial court's judgment and asks us to reform the judgment to delete that finding. In relevant part, the indictment in this case provides:

Charles Ray Dorsey ... did then and there intentionally and knowingly cause the shooting death of an individual, namely Pamela Gale Dorsey, by shooting her.

The jury found appellant was guilty "as charged in the indictment." It made no express finding as to the use of a deadly weapon.

In Polk v. State, 693 S.W.2d 391, 396 (Tex.Crim.App.1985), the court instructed that a trial court may not properly enter an affirmative finding concerning the defendant's use or exhibition of a deadly weapon during the commission of the offense unless:

1) the deadly weapon or firearm has been specifically pleaded as such and the verdict reads "guilty as charged in the indictment";

2) where not specifically pleaded as a deadly weapon or firearm, the weapon pleaded is per se a deadly weapon or a firearm; or

3) a special issue is submitted and answered affirmatively.

In Ex Parte Beck, 769 S.W.2d 525, 526

(Tex.Crim.App.1989), cited by the State, the court considered an indictment which alleged that the appellant caused the death of the victim "shooting him with 'a gun.' " In the course of its discussion, the court noted that the allegation was sufficient to give the defendant notice that the State would attempt to prove that the named gun was used in a manner that caused death and was, therefore, a deadly weapon. Id. at 528. However, the court warned, had the jury in that case not answered a special issue that the gun was a deadly weapon, "there would have been no affirmative finding of deadly weapon made, even upon the return of a verdict of 'guilty as charged in the indictment.' " Id.

In Boyett v. State, 692 S.W.2d 512, 517 (Tex.Crim.App.1985), the court had occasion to consider an indictment that charged a death was caused "by shooting him with a gun." As relevant here, the court reiterated its previous holding that a "gun" is not a deadly weapon. Id. That being so, the court concluded, "the indictment in this case does not allege a deadly weapon so as to permit a verdict of 'guilty as alleged in the indictment' to be considered an affirmative finding." Id. It is true that the Court of Criminal Appeals has held a "pistol" is a deadly weapon per se, see Giles v. State, 617 S.W.2d 690, 691 (Tex.Crim.App.1981), a "firearm" is a deadly weapon per se, see Stewart v. State, 532 S.W.2d 349, 350 (Tex.Crim.App.1976), and a "handgun" is a deadly weapon per se, see Dade v. State, 622 S.W.2d 580, 581 (Tex.Crim.App.1981).

*344 The State argues that although the indictment did not allege the specific murder weapon used in

shooting Pamela, the indictment alleged a death and means related to some weapon. Thus, it concludes, the jury made an explicit finding that appellant used a deadly weapon. We disagree. While it might be argued that the use of the word "shooting" in the indictment might mean some use of a firearm, a pistol, or a hand gun, all deadly weapons per se, it is equally reasonable to assume that it means the use of a "gun", which is not a deadly weapon per se. Under the present state of the law, we can only conclude the trial court erred in making the affirmative deadly weapon finding. Appellant's sixteenth issue is sustained. That sustention requires us to modify the trial court's judgment to delete all references to the use of a deadly weapon. See Tex.R.App. P. 43.2(b).

In summary, all of appellant's issues are overruled except his sixteenth issue which is granted. The trial court judgment is modified to delete all reference to the use of a deadly weapon. As modified, the judgment is AFFIRMED.

DAVID B. GAULTNEY, Justice, concurring.
I concur. But respectfully I write separately because I question the rationale of Boyett and the need to strike the deadly weapon finding in this murder case. See Boyett v. State, 692 S.W.2d 512 (Tex.Crim.App.1985).

Any object used to cause death is a deadly weapon. See Tex. Pen.Code Ann. § 1.07(a)(17)(B) (Vernon 2003)("Deadly weapon" means "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."). In a

homicide involving a "shooting," the instrumentality of death is a deadly weapon, because it is something that actually caused a death. The Court of Criminal Appeals has held that an indictment charging the accused with causing death by use of any instrument is sufficient notice of the State's intent to seek a deadly weapon finding. See Ex parte McKithan, 838 S.W.2d 560, 561 (Tex.Crim.App.1992) (indictment alleging death caused by motor vehicle provided notice of intent to seek affirmative finding of use of deadly weapon in an involuntary manslaughter case) (citing Ex parte Beck, 769 S.W.2d 525, 526-28 (Tex.Crim.App.1989)). Likewise, the Court of Criminal Appeals has said that anything actually used to cause the death of a human being is a deadly weapon for purpose of supporting a jury's deadly weapon finding. See Tyra v. State, 897 S.W.2d 796, 798 (Tex.Crim.App.1995) (approving deadly weapon finding in involuntary manslaughter case where a driver, by reason of operating a motor vehicle while intoxicated, caused the death of an individual). In contrast, Boyett unequivocally held that a jury's finding-that the accused committed voluntary manslaughter "as alleged in the indictment"-could not be considered an affirmative finding of the use of a deadly weapon where the indictment alleged that the accused caused the victim's death "by shooting him with a gun." Boyett, 692 S.W.2d at 517. If an indictment allegation provides sufficient notice of the State's intent to seek an affirmative finding, and if the evidence will support an affirmative finding, why does that same indictment by reference in the jury's verdict not function as an express deadly weapon finding? And, as here, where the jury finds a death was caused by shooting, how can the finding

be anything other than that a deadly weapon was used? But Boyett holds otherwise. Id. at 517. As an intermediate appellate court we are bound by Boyett. Because murder is a "3g" offense, the deadly weapon finding may seem irrelevant. See *345 Tex.Code *345 Crim. Proc. Ann. art. 42.12, § 3g (Vernon 2003). But a court should not be required to strike the judgment's deadly weapon finding when the indictment says the defendant intentionally and knowingly caused the death of Pamela Dorsey by "shooting her," and the jury found defendant guilty as charged in the indictment. It seems inconsistent with reason and the cited case law to do so. I believe the holding in Boyett should be reconsidered.

Tex.App.-Beaumont,2003.
Dorsey v. State
117 S.W.3d 332

• 09-02-00023-CR (Docket) (Jan. 17, 2002)
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APPENDIX C

NO. AP-1656-07

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

CHARLES RAY DORSEY

Appellant

VS

THE STATE OF TEXAS

Appellee

ON DISCRETIONARY REVIEW FROM THE
NINTH SUPREME JUDICIAL DISTRICT OF
THE STATE OF TEXAS

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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REQUESTING ORAL ARGUMENT

TABLE OF CONTENTS

LIST OF AUTHORITIES.....3
STATEMENT REGARDING
ORAL ARGUMENT.....4
STATEMENT OF THE CASE 5
STATEMENT OF THE PROCEDURAL
HISTORY OF THE CASE.....6
GROUNDS FOR REVIEW.....6
REASONS FOR REVIEW.....8
PRAYER.....19
CERTIFICATE OF SERVICE..... 20
APPENDIX.....21

INDEX OF AUTHORITIES

CASES PAGE

Crawford v. Washington, 541 U.S. 36 (2004) 13

Dorsey v. State, 24 S.W.3d 921 (Tex. App. – Beaumont, no pet.).....5

Dorsey v. State, 117 S.W.3d 332 (Tex. App. – Beaumont, 2003)..... 5

Garza v. State, 126 S.W.3d 79, 81 (Tex. Crim. App. 2004)..... 10

Moore v. State, 169 S.W.3d 467 (Tex. App. – Texarkana, 2005)..... 15

Morton v. State, 761 S.W.2d 876 (Tex. App. – Austin 1988, pet.ref'd) 11

Parrish v. State, 950 S.W.3d. 720 (Tex. App. – Ft. Worth 1997, no pet.)..... 11

Taylor v. State, 920 S.W.2d 319, 332 (Tex. Crim. App. 1996)..... 12

Whorton v. Bockting, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007)... 14

6th & 14th U.S. Constitutional Amendments

Rule

Tex. Code Crim. Proc. Art. (a)..... 19

Tex. R. Crim. Evid, Rule 107..... 18

Tex. R. Crim. Evid. 403..... 19

Tex. R. Crim. Evid. 404(b)..... 5+

T.R.A.P. P. 31 8

T.R.A.P. 33.1(a)(2)(A)..... 16

T.R.A.P. 66(a),(b),(c),(d)..... 7-8

Texas Family Code § 58.002..... 19

STATEMENT REGARDING ORAL ARGUMENT

Appellant Dorsey REQUESTS ORAL ARGUMENT as the issues presented herein present a unique complex mix of fact and law that should be settled by this Honorable Court. Because of society's virtual acceptance of Hollywood movie plots, an unrelated movie should not have been admitted in order to establish the prosecution's case. A movie plot should be considered "manifestly

improper" because its admission into evidence inherently shifts of burden of proof to the defense. No evidence existed to prove that the accused actually saw the movie. In Dorsey's first trial, the trial court held that the movie was an inadmissible comment on the weight of evidence. But in the third trial (that is the subject of this PDR), the court improperly admitted the evidence of the movie plot.

Further, Dorsey appeals the trial court's admission of a video tape created by the State in an attempt to re-enact whether the Dorsey's son, Conner, could have pulled the gun's trigger on the night in question. Dorsey challenges the tape on several grounds, including that it was an improper experiment, improper interview, and obtained in violation of a court order. Dorsey contests the State's latitude in maintaining inconsistent positions in multiple trials concerning why they proffered the tape, is abject gamesmanship. Dorsey raises issues related to fact-intensive hearsay statements and denial of his right of confrontation.

In light of the aforementioned considerations, Dorsey submits oral discussion of the mixed facts and applicable precedents would benefit the Court in fashioning a decision for the instant case.

STATEMENT OF THE CASE

Appellant Dorsey appeals his conviction in his third (3rd) trial for murder after the Ninth Supreme Judicial District of Texas reversed the original conviction in *Dorsey v. State*, 24 S.W.3d 921 (Tex. App. – Beaumont, no pet.), holding the error in admitting Pamela's (decedent's) hearsay statements required reversal. A second trial resulted in a hung jury deadlocked at 7 to 5. Upon retrial, 1.) Over

objection, Appellant was harmed in *Dorsey v. State*, 117 S.W.3d 332 (Tex. App. – Beaumont, 2003), where the Ninth Supreme Judicial Court failed to properly apply rule TRE Rule 403 and Rule 404(b) and confrontation right guarantees while considering the State's admission of a movie plot to prove "motive and intent" without proving he'd seen the movie. The Hollywood movie plot was irrelevant and its prejudicial effect strongly outweighed any probative value; it constituted a comment on the weight of evidence and unconstitutionally shifted the burden of proof to the defense; 2.) After a pre-trial Motion to Suppress, thus preserving err, granted in part, the Ninth Court failed to consider Appellant's objection applying state & federal case law and rules by allowing the child's video taped reenactment of the purported event; 2.a) The inaptly termed "interview-experiment-reenactment" constituted hearsay and violated Appellant's confrontation rights and over objection, the prosecution vacillated in their characterization of this re-enactment calling it an 'interview,' and at times changing the characterization to 'experiment' when it suited their purpose; it met neither 'interview' or 'experiment' criteria, thus, reversibly harming Appellant as the State maintained inconsistent positions in successive trials on the same charge; 3.) the Court failed to correctly apply the Rule of Optional Completeness misused by the State to enter prejudicial hearsay testimony previously ruled inadmissible by the law of this case which overturned *Dorsey*, 24 S.W.3d, *Id.*

PROCEDURAL HISTORY OF THE CASE

The Court of Appeals of the Ninth Supreme Judicial District of Texas affirmed Appellant's conviction on August 28, 2003, in *Dorsey v. State*, 117 S.W.3d (Tex. App. – Beaumont, 2003). This court found Applicant was entitled to file an out-of-time Petition for Discretionary Review of the Ninth Court of Appeals in Cause No. 09-98-501-CR that affirmed his conviction in Case No. 96-08-01088-CR from the 284th District Court of Montgomery County. A Mandate was filed on October 8, 2007, therefore, this Petition is due to be filed on November 7th, 2007.

GROUNDS FOR REVIEW BY QUESTION

Did the Court of Appeals err in affirming the trial court's denial of Appellant's TRE Rule 403 and 404(b) objection to the admission of a Hollywood movie plot that was used by the state to establish and bolster their 'theory of the case', even though they failed to establish Dorsey had *seen* such movie.

Did the Court of Appeals err in affirming the trial court's decision admitting the "Conner video tape" when the state had been inconsistent throughout the three jury trials as to the reason for the admissibility of a unique piece of evidence. The state and the Court were not consistent between the several trials in their characterization of the video as interview-experiment/reenactment. Further, did the Court violate the Sixth Amendment *Crawford* reasoning by playing this video of Appellant & Decedents' 2-½ yr old child without the audio, pursuant to Order, and in its place allowing an officer/witness to narrate the meaning of the verbal

acts and colloquies that were on the tape, thereby violating Appellant's confrontation right?

REASON FOR REVIEW

T.R.A.P. 66.3(a)

Review should be granted because the Ninth Court of Appeals decision conflicts with another court of appeals' decision on the same issue. See argument below.

T.R.A.P. 66.3(b)

Review should be granted because the Ninth Court of Appeals decided an important question of state and federal law that has not been, but should be, settled by the Court of Criminal Appeals. See argument below.

T.R.A.P. 66.3(c)

The Ninth Court of Appeals decided an important question of state and federal law in a way that conflicts with applicable decisions by the Texas Court of Criminal Appeals and the U.S. Supreme Court. See argument below.

T.R.A.P. 66.3(d)

The Ninth Court of Appeals misconstrued statutes and rules governing preserving error for review on appeal and the admissibility of evidence in the instant case. See argument below.

Argument & Authorities

Movie Plot Admission into Evidence

Pursuant to T.R.A.P. P. 33.1, Dorsey complained to the trial court in pre-trial motions and re-urged timely objections during trial stating the grounds with sufficient specificity to make the trial court aware of Dorsey's complaint.

The State proffered the Hollywood movie thriller *Never Talk to Strangers* to outline the theory of their case and claimed it served to prove Dorsey's motive. There was no evidence

whatsoever that Appellant Dorsey had *seen* the movie or that he even owned a *proper and operational device* to play the movie. Dorsey, therefore, submits that it's admission into evidence violated TRE Rule 404(b) as irrelevant, and TRE Rule 403 because it's prejudicial effect far outweighed any probative value, it confused the issues, misled the jury and constituted an impermissible comment on the weight of evidence and violated Dorsey's confrontation rights.

Dorsey would submit it is axiomatic that unless direct proof is submitted that he had viewed and/or participated in the movie, the concept of proffering a movie plot to outline the State's theory of the case was improper bolstering. The movie inherently and impermissibly shifted the burden of proof to the defense. Additionally, without proof that Dorsey possessed operational equipment to view the movie, the evidence could not make the existence of any fact more or less probable. A film produced by Hollywood with major motion picture stars like Antonio Banderas, Rebecca DeMorney, and Dennis Miller, can have undue, disproportionate influence on a jury. In the present case it diminished the crucible of adversarial testing which has been the hallmark of our pursuit of truth in our courts. The very reason that politicians appreciate the endorsement of Hollywood movie stars and that many people ask for their autographs, is the same reason why their undue influence should not be allowed to affect the outcome of an unrelated criminal case.

Imagine, just for a second, the damage that could be done to Lee Harvey Oswald's defense by playing Kevin Costners' courtroom scene in *JFK* if

Oswald had lived and had been tried for the murder. And yet in that example the theory directly relates to the facts in issue. To allow a totally unrelated movie plot should be considered "manifestly improper" as such will destroy the time-tested adversarial trademark of advocacy and will only lead to an endless succession of movie plot submissions. As an example, Could the defense have followed suit by countering with the antipodal plot in the movie *The Fugitive*, only to be followed by the State proffering *Fracture* and *Perfect Stranger* as rebuttals to one another?

Dorsey filed a motion to suppress which was heard and denied by the court. Dorsey further objected during trial as a re-urging of the salient reasons for his complaints. Dorsey's motion to suppress the movie and objections were granted in part and denied in part and therefore preserved for appeal under TRAP 33.1(a)(2)(A) and *Garza v. State*, 126 S.W.3d 79, 81 (Tex. Crim. App. 2004). Dorsey re-urged objections at trial were precautionary and supportive of an attempt to be through and complete (Trial R., v.8, p.19-20).

The trial court overruled Dorsey and permitted Officer Tidwell to narrate the plot of the movie to the jury, (Trial R., v.8, p.22 thru p.23-24), *Dorsey* 117 S.W.3d at 337. The State then offered evidence that the movie was rented under the 'Dorsey account' shortly before Decedent's death. The State then planted their theory of the case to the jury that Dorsey got the idea of blaming Conner, their son, for decedent's death from the movie plot.

However, because the State failed to offer evidence linking Applicant Dorsey to viewing the movie, evidence about the movie was irrelevant

under 404(b) and overly prejudicial and confusing under 403. In the first trial, testimony by the video rental clerk Peggy McRae that the Dorseys were customers of her video store and that 'someone from the Dorsey household rented the movie,' by implication indicated that someone other than Chad rented the movie, (Trial R., v.7, p.246; v.8, p.5-6, 9-15). The State totally failed to demonstrate that Dorsey had seen the movie or possessed operational equipment to view the movie. Therefore, it is only logical that the sole purpose of the State's proffer of the movie plot was to illustrate a theory of their case, which unequivocally constituted an impermissible comment on the weight of the evidence, cumulatively, violating Dorsey's substantial rights.

Case Law Regarding Admission of Movies or Videos to Prove Motive

The circumstances where a motion picture can serve as relevant evidence of motive is very narrow. Where there is evidence the defendant made the movie or evidence corroborating the defendant actually viewed the movie, such movie *may* be admissible. No such evidence was ever produced to meet the requisite threshold establishment of relevance in violation of TRE Rule 404(b).

THE ERROR IN 117 S.W.3D 332 (Tex. App. – Beaumont, 2003)

In analyzing the admission of the above referenced movie plot, the Ninth Court relied on cases where there was evidence the defendant had viewed the movie, (*Morton v. State*, 761 S.W.2d 876

(Tex. App. – Austin 1988, pet.ref'd) and *Parrish v. State*, 950 S.W.3d. 720 (Tex. App. – Ft. Worth 1997, no pet.)), *Dorsey*, 117 S.W.3d at 335, thereby substantiating relevance. No such evidence or connection existed in the instant case.

Further, in *Dorsey*, *Id.* at 335, Dorsey submits the Court improperly glossed over any justification for the relevance 'to show appellant's motive and intent...' and since the leap was not based on evidence of Dorsey seeing the movie, the error was especially egregious in this circumstantial case.

IMPROPER 403 BALANCING TEST (TRAP 66.3(a),(c))

The Ninth Court then moves to a 403 weight analysis pursuant to *Taylor v. State*, 920 S.W.2d 319, 332 (Tex. Crim. App. 1996), where they err again in the application of the analysis. For purpose of brevity, Dorsey has grouped together the question and answer thusly, a court is to consider: 1.) whether the issue was seriously contested by the opponent of the evidence? – "hotly contested" was correctly assessed by the Ninth Court; 2.) Whether the State had other convincing evidence to establish the ultimate issue to which the disputed evidence was relevant? – Dorsey contends it was error to consider the video relevant and the Ninth Court *admits there was no other* convincing evidence; 3.) The compelling nature, or lack thereof, of the evidence? – Dorsey contends the proffered movie plot mirrored the facts of his case and even what was characterized as 'only brief testimony about the movie' was sufficient to reflect the 'movie in a nutshell' and constitute an improper comment on the weight of the evidence; 4.)

The likelihood that the evidence was of such a nature to impair the efficacy of a limiting instruction? – The Ninth Court erred again as they characterize the movie as "fictional". Dorsey recalls no evidence in the record that the movie was fictional. *Id.* at 336. The movie was their case! The Ninth Court's conclusion in this circumstantial evidence case was that the trial court did not abuse its discretion in admitting the movie plot. This evaluation was improper and prejudicial.

ADMISSIBILITY OF CONNER'S VIDEO, *Id.* at 336-37

This issue was comprised of six issues on appeal and presents mixed issues of law and facts. The State violated Appellant's federal and state due process rights by maintaining inconsistent positions as to the purpose of the tape throughout the first and second trials. The trial court, upheld by the Ninth, committed reversible error denying *in part*, Dorsey's Motion to Suppress the video because it was an improper interview; the tape constituted hearsay; the tape was obtained in violation of a valid court order and because the child was not under oath nor capable of being confronted or cross examined, the Ninth Court upheld a violation of Dorsey's confrontation rights as defined under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Having taken custody of Connor (Appellant and decedent's son), the State set up a reenactment /experiment/interview to determine if this child could fire the gun This was done outside the presence of a defense representative and without the permission of the child's managing conservator.

In a room normally used to interview sexually abused children, Connor was encouraged to play with the weapon and talk about the shooting (Suppr. R., p.202; Trial R., v.6, p.8-19). This session was recorded and produced a forty five minute video tape (Suppr. R., p.204).

Over Appellant Dorsey's continued fervent objections, the trial court, upheld by the Ninth Court, committed reversible error taking a position contrary to established law about the reenactment video being an 'interview' or an 'experiment,' stating, '[i]t is not relevant whether it's an experiment or an interview. You can call it whatever you want to." (Trial R., v.5, p. 208; v.6, p. 18-19); *Dorsey*, 117 S.W.3d at 337. The State was allowed to take inconsistent theories or positions in successive trials on the same evidence which patently raises a question of prosecutorial misconduct. Such improper flip-flopping violated Appellant's due process rights under both, federal and Texas Constitutions. Further, in such re-enactment, the State never proffered evidence that the gun holster was always kept properly secured. The video prejudicially demonstrated that the child had difficulty opening the holster and the officer assisted Conner in doing so. It would be a necessary prerequisite to make this purported experiment even arguably valid

Dorsey asserts such tape was 'testimonial' in nature as, "[t]estimonial statements are not limited to statements given under oath." And can result from 'verbal acts' such as the actions of Conner on the video which were intended to be testimonial to the jury. *Crawford, Id.* 541 U.S. at 51-52, 124 S.Ct. 1354. Dorsey submits *Crawford* is applicable to this

issue. *Whorton v. Bockting*, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) at 1177.

In addition, the Court noted several proposed definitions for testimonial evidence, such as :

"ex *parte* in-court testimony, ... custodial examinations... prior testimony that the defendant was unable to cross-examine.... or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. "Testimony," ...is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Webster, An American Dictionary of the English Language.* This tape of Conner was used to prove a fact: that Conner could not open the holster and pull the trigger of the gun and was therefore, testimonial in nature and subject to confrontation right consideration. Dorsey submits this video constituted '*ex parte* in-court testimony' where the acts of the child were deliberately 'intended and prepared for prosecution of the case being investigated' and therefore, violated Dorsey's confrontation rights. Thus, if the nature of the interaction possesses a sufficient formal quality such that it is the functional equivalent of *ex parte* in-court testimony, the statement is testimonial." *Crawford, Id.* 61, 124 S.Ct. 1354. *Also see, Moore v. State,* 169 S.W.3d 467 (Tex. App. – Texarkana, 2005) REVERSED AND REMANDED, holding 1.) that a videotape was testimonial, and thus, violated the Confrontation Clause [even though, as in the instant case, portions of the audio were inaudible], 2.) Admission of videotape was harmful error, and 3.) the evidence was legally sufficient to support conviction. Such decision falls under the review of TRAP 66.3(a) as it conflicts with another Court of

Appeals decision, *Moore, Id.*, and 66.3(c) by violating confrontation decisions decided by this Court and the Supreme Court in *Crawford, Id.*

Further, the Ninth Court erred in their analysis and holding at p.337, by not properly considering the manner in which the play of Conner's video tape began. With Bonnie Tidwell on the stand for the State, (Trial v.6, p.19&20), they start, stop, freeze-frame, fast-forward and start again. Once the video finally rolled continuously, Dorsey reiterated his objection that "the tape speaks for itself" which objection the Ninth Court found untimely. This finding does not take into consideration or accurately depict the start-stop inconsistent beginning and presentation of this evidence, and ignores the States' concession during the Hearing on Defendant's Motion to Suppress where at p.233, ll- 7&8, the State says it won't play the audio and further, at p.234, ll- 15&16, the STATE reassures that the video is "self-explanatory." Not coincidentally, Dorsey asserted this very phrase as his trial court objection.

Additionally, their analysis ignores Ms. Tidwell's narration and interpretation of the video where the audio portion was ruled inadmissible by the Trial Court in the Order on Defendant's Motion to Suppress. Ms. Tidwell's narrative improperly served to replace or substitute for such audio which was also objected to as a "denial of confrontation" in the Hearing on Defendant's Motion to Suppress, expressly granted in part by Order as to the Audio, p.264, ll- 8-10. *See Garza, Id.* at 81 and T.R.A.P. 33.1(a)(2)(A).

Continued error was committed as this video was obtained without a court order, parental or

conservator permission violating the Texas Family Code § 58.002 and was therefore, without due process and in violation of applicable law, inadmissible under Tex. CCP art. 38.23(a), as pled in Dorsey's Closing Suppression Statements, p.264, ll-13-15, and p.29 of Dorsey's Brief.

Dorsey was prejudiced by the child's apparent difficulty in opening the holster and the fact that the narrator intervened before the child could complete his attempt to open it and assisted him in opening the holster.

Conclusively, the Court erred *Id.* at 339 where they played the videotape "without sound." "..the actions of the child were merely being observed.." though Tidwell narrated after the Court had ruled that the audio was inadmissible. Such err was harmful as evidenced by the jury note on Scanned File Page 271, where the jury requests, "to see the video of Conner .. with the policewomen.." violating Dorsey's substantial due process rights.

ERROR AT p. 340

The Ninth Court erred in finding 'no testimony elicited by the State that Pamela believed appellant would harm or kill her *or words to that effect*." Within Dorsey's citations, please examine Trial R., v.3, p.35, ll- 5-6: where Linda Reynolds testifies, "She was a little bit stressed or nervous, or appeared very nervous to me;" p.36, ll- 14-16: "She was afraid that her husband would take Conner and run away with him and she would never see him again;" ll- 18: "..she was afraid of Mr. Dorsey?" ll-19: "Yes she was." Trial R. v.6, p.36, ll- 19-20: "She seemed nervous, kind of on edge, talking fast, a little up tight about it." Melvin Franklin at Trial R. v.5, p

206, ll- 2-4: "Ms. Reynolds related that she was afraid to go home due to the fact that she was afraid that Chad [Dorsey] would either **kill her** or take the child."
Counsel exhaustively objected to the State's question line and Detective Franklin's answers as "hearsay and denial of confrontation" since this was the 'rule of the case' in that the Ninth Circuit had reversed the first trial for the exact same error. The State improperly used the Rule of Optional Completeness (see Dorsey Brief page 39) in order to effectuate the admissibility. *See,* TRAP Rule 66.3(d).

The Ninth Court additionally failed to address Dorsey's argument about this improper use of optional completeness, *see* Trial R. v.5, p.193, generally, through page 206, counsel had the witness use a document to refresh the witnesses memory because the witness claimed not to remember the results of a trigger pull test that the witness had performed on the weapon. The witness was given the opportunity to look at the document he prepared and which contained the details and results of the trigger pull test.

He was asked if he needed to refresh his memory, to do so, but not to read from the document out loud before the jury. .Counsel also stated that he did not want to introduce or admit any portion of the document. Counsel was looking for a specific test measurement and in no way was attempting to 'impeach' the witness as the State mischaracterized, in order to justify an improper use of the Rule of Optional Completeness. There were no half truths elicited and no partial stories to be completed. The statement by Reynolds was not related in any way

to the trigger pull results and was not necessary to put those results in proper context.

Detective Franklin re: Trigger Pull test results--	Detective Franklin *re: Linda Reynolds*---: "Ms. Reynolds related that she was afraid to go home due to the fact that she was afraid that Chad [Dorsey] would either **kill her** or take the child."
Q-...You don't have to read it out loud to anybody, nor do I want to admit it, but would you like to review the document, if you don't recall?...I'm not asking him to testify from it, Judge, just to review it if he doesn't recall. If he does recall, he can just give us the figure...You don't need to review this if you don't have to....You don't need to read from the document, just tell us. A...per this document, which I do not recall at the time,...**12 pounds** on the double action and **7 pounds** on the single action.	

TRE 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is **introduced** by a party, an adverse party may at that time introduce any other part of any other writing or recorded statement which **ought in**

fairness to be considered contemporaneously with it.

TRE 107 Rule of Optional Completeness

When part of an act, declaration, conversation, written or recorded statement is given in evidence by one party, the whole **on the same subject** may be inquired into by the other, and any other act, declaration, writing or recorded statement which is **necessary to make it fully understood or to explain the same** may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given.

'Chad is going to kill me' is not related to, explained by, nor necessary to understand trigger pull findings.

This misapplication of law was intermixed with counsel's specific objections under 404(b), 403, denial of confrontation rights and the law of the case. Therefore, the Ninth Court of Appeals committed error for improper application of the Rule of Optional Completeness; and the actual law from the instant case in *Dorsey*, 24 S.W.3d. *Id.* (See, Trial R. v.5, p.198, ll- 23-24; p.202, ll- 22-25; p.204, ll- 2-5; Tex. C.C.P. art. 38.23(a) and Tex. Fam. Code § 58.002 and made decisions contrary to other appellate courts.

PRAYER

Appellant respectfully prays the Honorable Justices review the record in this case and grant Dorsey's petition in order to determine if the Ninth Court of Appeals erred under Tex.R.App.Proc. 66.3(a), (b), (c) & (d) and violated Dorsey's substantial rights.

Respectfully submitted,
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this petition for discretionary review was mailed to the Ninth Supreme Court of Appeals – Beaumont, the Montgomery County District Attorney's Office and to the State's Attorney's Office, P.O. Box 12405, Austin, Texas, on this [18th] day of October, 2007.

/s/
Jimmy B. Parks, Jr.

APPENDIX TO PDR

Rule 33.1 states:

As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the compliant was made to the trial court by a timely request, objection, or motion that:

(A)stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or **motion**, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

APPENDIX D

Official Notice from
Court of Criminal Appeals of Texas
P.O. Box 12308, Capitol Station,
Austin, Texas 78711

Wednesday, February 06, 2008
Re: Case No. PD-1656-07
COA#: 09-02-00023-CR
STYLE: DORSEY, CHARLES RAY

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

Jimmy Parks
214 Dwyer Ave, STE 210
SAN ANTONIO, TX 78204

APPENDIX E.

U.S. Constitutional Provisions

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

Section 1 of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Appendix F

Texas Rules of Evidence, Rule 107
Rule of Optional Completeness

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole *on the same subject* may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters *on the same subject* between the same parties may be given.."

Appendix G

Texas Rules of Evidence, Rule 403
Exclusion of relevant evidence on Special Grounds

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needles presentation of cumulative evidence.

Appendix H

Texas Rules of Evidence, Rule 404(b)
Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

The relevancy inquiry necessary under Rule 404(b) of the Texas Rules of Evidence is best described in the controlling Texas case, *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990), 'that the "fact of consequence" includes either an elemental fact or an evidentiary fact from which an elemental fact can be inferred. An evidentiary fact that stands wholly unconnected to an elemental fact, however, is not a "fact of consequence." A court that articulates the relevancy of evidence to an evidentiary fact but does not, in any way, draw the inference to an elemental fact has not completed the necessary relevancy inquiry because it has not shown how the evidence makes a "fact of consequence" in the case more or less likely.